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No. 82-867

IN THE

Supreme Court of the United States

October Term, 1982

FAITH CENTER, INC.,

Petitioner,

vs.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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Questions Presented.*

1. Whether dismissal by the Federal Communications Commission of a license renewal application due to alleged bad faith discovery performance violates due process when the "bad faith" finding is based on an erroneous legal premise.

2. Whether due process requires that the validity of first amendment objections to discovery demands be adjudicated prior to imposing sanctions for refusal to comply with discovery orders and, if so, whether due process further requires that sanctions not be imposed where discovery has been resisted precisely in order to obtain a ruling on those first amendment objections.

3. Whether free exercise of religion is abridged where the government, without demonstrating a compelling governmental need, compels disclosure of the identity of church donors and the amount of their contributions even though a central theological tenet of that church and its contributing public donors is to give "in secret."

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*Petitioner Faith Center, Inc. has no parent companies, subsidiaries or affiliates within the meaning of S. Ct. R. 28.1.

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FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioner, Faith Center, Inc., respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on April 7, 1982, affirming orders of the Federal Communications Commission dismissing petitioner's television license renewal application and denying petitioner distress sale relief.

OPINIONS BELOW.

The judgment of the Court of Appeals is unreported and is reproduced in Appendix A (p. 1). The opinion and order of the Federal Communications Commission is reported at 82 F.C.C.2d 1 (1980), and is reproduced in Appendix D (pp. 5-68). The opinion and order of the Administrative Law Judge is unreported.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 7, 1982. A timely petition for rehearing and a suggestion for rehearing *en banc* were denied on June 22, 1982. (Apps. B and C (pp. 3, 4)). On August 27, 1982, Chief Justice Warren E. Burger extended the time within which to file a petition for a writ of certiorari to and including November 19, 1982. (App. E (p. 69)). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED.

United States Constitution, Amendment I, Amendment V, which are printed in full in Appendix F (p. 70).

STATEMENT OF THE CASE.

A. Informal Investigation.

This controversy began in 1977 when investigators for the Federal Communications Commission ("FCC" or "Commission") appeared at petitioner Faith Center, Inc. ("Faith Center"), a 34-year-old congregational polity church with over 10,000 contributing members,[1] and demanded access to comprehensive financial records and interviews with bookkeeping personnel. 1 Jt. App. 58.[2] The Commission maintained that this information was needed in order to investigate allegations that television station KHCF-TV, which is licensed to Faith Center, had been used to solicit funds for purposes that subsequently were not

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[1]Dr. W. Eugene Scott is the elected Pastor of Faith Center and also President of the Full Gospel Fellowship of Churches and Ministers International, which is comprised of 2,000 member churches, including petitioner, with over 1.5 million congregants. Brief of Appellant 7 n.10, *Faith Center, Inc. v. FCC*, Nos. 81-1648 & 81-1649 (D.C. Cir. filed Nov. 24, 1981).

[2]"Jt. App." references are to the Joint Appendix filed below in connection with Appeal Nos. 81-1648 and 81-1649 in the United States Court of Appeals for the District of Columbia Circuit. A copy of the Joint Appendix has been lodged with the Clerk of this Court. References to "App." refer to the Appendix to this petition.

accomplished. App. 7.[3] While responding in part, Faith Center refused fully to comply with these unlimited demands because, among other reasons, the information requested, such as "accounts receivable ledgers" and other records, *id.*, would have required petitioner to reveal the identities of its donors and the details of their donations, matters which Faith Center is theologically mandated to keep secret. *See* § IIIB, *infra*. Accordingly, for these and other reasons, Faith Center asserted that these matters were "protected from governmental scrutiny by the religious freedom clauses contained in the First Amendment." *Faith Center, Inc.*, 69 F.C.C.2d 1123, 1124 (1978), 1 Jt. App. 50.

Thereafter, on June 15, 1978, the Complaints and Compliance Division of the Broadcast Bureau of the FCC wrote a "By Direction" letter again requesting compliance with its informational requests. 1 Jt. App. 49-54. In this letter, the FCC noted Faith Center's objections to investigation of "private church matters," but made the broad determination that "[a] licensee's operation of a public broadcast station may not be shielded from public scrutiny because of its standing as a religious organization." *Id.* at 52-53. Consequently, the FCC again demanded essentially the same broadly defined information that it had requested previously and warned that failure to comply would result in immediate designation for hearing of the station KHOF-TV license renewal application. *Id.* at 53.

In so doing, however, the FCC recognized that petitioner's objections had been "advanced in good faith and

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[3]The only sources of the allegations which prompted the investigation were, by the FCC's own admission, two disgruntled former employees. *See* 1 Jt. App. 91, 93-94. Both individuals subsequently admitted, however, that they had no knowledge or information that Faith Center had defrauded its audience or had made misrepresentations in its fund raising. 8 Jt. App. 2096-97; 9 Jt. App. 2178. Because these proceedings were aborted at the discovery stage, the truth of the allegations was never tested or, apparently, even taken into account by the Broadcast Bureau or the FCC.

in [petitioner's] sincere belief in their validity." *Id.* at 50. The FCC also recognized the sensitive nature of maintaining donor secrecy and the first amendment implications of mandating disclosure of such information. The FCC then believed that it could assess the validity of the allegations of misconduct against petitioner without production of donor information and therefore agreed not to demand such information at that time. *Id.* at 53 n.1.[4] Although Faith Center substantially complied with this FCC directive,[5] the Commission was not satisfied, and the license renewal application was designated for hearing. 1 Jt. App. 55-56.

B. Formal Proceedings Regarding License Renewal.

Notwithstanding this assurance by the FCC that it would not delve into the identity or donations of donors, the Broadcast Bureau immediately sought this and other information in its first set of interrogatories and production requests propounded in December, 1978. *See* App. 40, 43; Interrogs. 13-15; Doc. Prod. Reqs. 1, 2, 3, 5; 1 Jt. App. 81, 74-75. Faith Center responded to some of these interrogatories, 1 Jt. App. 111-20, but opposed the Broadcast Bureau's various attempts to compel further responses on a number of constitutional and procedural grounds, including the contention that by requiring revelation of individual donation records, many of the inquiries improperly impinged upon the free exercise rights of the church and its members. *See*

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[4]The Commission stated as follows:

> "Faith Center states that compliance with a Commission request to furnish the names of all persons contributing or pledging funds, and the disposition of each such pledge or contribution, would violate both the rights of the donors and the Church's right to protect the confidentiality of such persons. The Commission believes that it may be able to make a determination in this case without submission of this information and will not require its production, at least for the present."

1 Jt. App. 53 n.1.

[5]*See* Brief of Appellant 6, *Faith Center, Inc. v. FCC*, Nos. 81-1648 & 81-1649 (D.C. Cir. filed Nov. 24, 1981).

1 Jt. App. 112-13, 119-20, 125-26, 232-37; *see also* 5 Jt. App. 1270.

After hearing argument on March 30, 1979, Administrative Law Judge ("ALJ") Head refused to rule on the constitutional questions before him. While admitting that "it may well be that the constitutional argument could prevail . . .," the ALJ held that "if there are religious First Amendment defenses that will come up . . . those arguments can be made at the time of hearing, after the evidence is in." 8 Jt. App. 2047-48. Judge Head further indicated that he would not reconsider and in fact might be bound by the Commission's treatment and rejection of petitioner's first amendment arguments in the By Direction letter. *Id.* at 2042-43, 2045-48. The motion to compel was therefore granted. 1 Jt. App. 272-75.

Subsequent to this ruling, petitioner continued to press its constitutional claims. Faith Center first sought permission to appeal the order to the Commission, *id.* at 277-82, arguing, among other things, that a portion of the discovery being compelled involved information on pledges, which conflicted with the Commission's prior determination in its By Direction letter that such information should be excluded from scrutiny. *Id.* at 279, 295. On May 11, 1979 the ALJ rejected this request, primarily because Faith Center would "be able to make its Constitutional arguments on the merits" and therefore these arguments would not "lie to bar discovery." *Id.* at 296.

Faith Center thereafter unsuccessfully sought to obtain judicial review of the ALJ's ruling by interlocutory appeal to the United States Court of Appeals for the District of Columbia Circuit, again arguing, *inter alia*, "that the requests violated the Church's First Amendment rights and would result in an unwarranted entanglement by the Commission in church activities and affairs." 1 Jt. App. 1336-37. The Bureau filed a motion to dismiss this appeal claiming that the "interlocutory rulings of the ALJ are not final

orders appropriate for review by this Court under Section 402(b)" and that therefore the Court of Appeals lacked jurisdiction to review the case. App. 71-74. That motion was granted and the appeal was dismissed without reaching the merits on July 13, 1979. App. 75.

Finally, petitioner initiated a collateral action against the Commission in federal district court, again seeking an adjudication of its first amendment claims and urging that under no circumstances would it be appropriate to reveal its contributors. *Faith Center, Inc. v. FCC*, No. CV-79-02901-NML (C.D. Cal. filed Aug. 1, 1979); Transcript of Proceedings, at 18-20, 22-23 (Aug. 20, 1979). Judge Lucas dismissed this action based on the Commission's assurance that petitioner would have an opportunity at a later date to have its first amendment claims heard and decided both at the administrative and judicial levels. *Id.*, Transcript of Proceedings at 6-8, 9, 13, 29.

Within a week of the dismissal of the July 13 interlocutory appeal, petitioner responded to the discovery requests, 2 Jt. App. 319-27, attempting to comply with the Bureau's demands while strenuously urging that petitioner simply could not violate its trust relationship with its members by revealing their identities and contributions. *E.g.*, *id.* at 327C, D, G, H, Q. Further responses were filed approximately two months thereafter. *Id.* at 350-96. Nevertheless, on July 30, 1979 the Broadcast Bureau moved to dismiss petitioner's renewal application for its alleged failure fully to have responded to discovery. *Id.* at 329-43. In response to this motion, Administrative Law Judge Luton, who had replaced Judge Head on June 15, 1979, ordered Faith Center on August 6 and 8, 1979 to file additional responses to the Bureau's discovery requests, which included donor information. *Id.* at 345-46. Petitioner submitted further responses on August 17, 1979, *id.* at 350-85, but refused to reveal donor identities, urging that "the requested material would violate the directive of the Commission [in its By Direction

letter]. The licensee joins in this explicit recognition of the violation of first amendment rights occasioned by such a request." *Id.* at 352.

On August 22, 1979 the Bureau renewed its request for a ruling on its motion on narrowly delineated grounds. *Id.* at 397-99. Acknowledging that petitioner's August 17, 1979 responses satisfactorily answerd all of its interrogatories and three of its four document requests,[6] the Bureau emphasized that the "sole basis for [its] dismissal request is Faith Center's refusal to produce" certain videotapes which petitioner claimed it neither owned nor possessed. *Id.* at 517. Although the tape production was briefed by the parties, the Administrative Law Judge did not rule on this issue.

Suddenly, over one year after petitioner's renewal application had been designated for hearing and on the eve of the then-scheduled hearing, the Bureau filed a second set of interrogatories and requests to produce documents on October 1, 1979. 3 Jt. App. 551-84, 585-89. This set far exceeded the scope of the Bureau's first interrogatories and document requests. *See* App. 31. Petitioner objected to these discovery requests on various grounds, reasserting its constitutional objections. *E.g.*, 3 Jt. App. 578-79, 582-83; Opp. to Broadcast Bureau's Mot. to Compel at 7 (filed Nov. 9, 1979).

In a memorandum opinion and order released on December 4, 1979 the ALJ addressed and overruled most of petitioner's objections. 3 Jt. App. 656-59. Significantly, however, Judge Luton failed to decide petitioner's constitutional claims. In addition, the ALJ threatened that failure strictly

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[6]The Administrative Law Judge later criticized the content of Faith Center's responses in an order regarding a second set of interrogatories, 3 Jt. App. 660-63, and in his order dismissing petitioner's license renewal application, 4 Jt. App. 890 (citing prior analysis). In view of the fact that the party propounding the discovery expressed no such dissatisfaction, these observations are obviously irrelevant and constitute an insufficient basis on which to justify the dismissal of the renewal application.

to comply with the terms of his order could lead to dismissal of the renewal application. *Id.* at 659.

Prior to a ruling on an unsuccessful interlocutory appeal to the Commission in which petitioner reasserted the first amendment rights of the church and its donors, *id.* at 673-78, 713-14, petitioner responded to the Bureau's second set of interrogatories on December 14, 1979. In these responses, as it had from the beginning, petitioner objected "to each and every interrogatory which requests information revealing any contribution records." *Id.* at 679. Petitioner explained further that "[q]uestions requesting information about individual donation records clearly violate the Commission's express exception in its 'By Direction' letter of June 15, 1979." *Id.*

Unsatisfied with petitioner's responses, the Bureau filed a motion to compel answers on December 26, 1979. Petitioner, in turn, submitted supplemental responses on January 11, 1980, *id.* at 722-31, but otherwise, and again for constitutional reasons, opposed the Bureau's motion to compel. *Id.* at 732-45. In particular, petitioner pointed out that it could not fully comply with Interrogatory No. 3, which would require revelation of secret donor information. *See id.* at 738-40. The Bureau continued to disagree with petitioner's objections and therefore sought an order to show cause why Faith Center's license renewal application should not be dismissed for failure to prosecute. *Id.* at 751. Petitioner filed an opposition thereto on February 1, 1980. *Id.* at 761.

Shortly thereafter, on March 17, 1980, without even ruling on the motion to show cause or considering lesser sanctions, the ALJ dismissed petitioner's license renewal application on his own motion two weeks after petitioner had filed a declaration of distress sale, *see* § C, *infra*. 4 Jt. App. 889-97. The ALJ did so based on his conclusion that petitioner had failed to respond to the Broadcast Bureau's discovery requests in good faith and had thereby deliberately

obstructed the proceedings. 4 Jt. App. 897; *see* App. 37-38. In particular, the ALJ predicated its bad faith determination on petitioner's non-compliance with his December 4 discovery order regarding the Bureau's second set of interrogatories and document requests. 4 Jt. App. 897. As examples of petitioner's misfeasance, Judge Luton made reference to the inadequate responses to Interrogatories Nos. 3 and 36, both of which necessitated identification of donors and their contributions. *See id.* at 893, 896.[7]

Petitioner appealed to the FCC, which affirmed the dismissal on November 14, 1980. App. 54. The Commission agreed that dismissal was proper because petitioner's performance during the discovery phase of the proceedings displayed "bad faith." *Id.* at 42-43. In reaching this conclusion, the FCC placed "critical significance" on the July 13, 1979 summary dismissal by the Court of Appeals of petitioner's attempt to appeal on constitutional grounds the

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[7]Interrogatory No. 3 enjoined Faith Center to provide, *inter alia*, "[t]he identity of all financial records . . . consulted while at Faith" by "the bookkeepers and accountants who are/were employed by Faith and/or reviewed the licensee's financial records" and "[t]he identity of the financial records and books in which they made entries." 2 Jt. App. 553. This interrogatory required Faith Center to disclose the names of its donors as well as the details of each donation they made because to identify a document within the meaning of the interrogatories meant "to state the date, author, addressee, type of document . . ., a brief description of its subject matter, its present or last known location, and its custodian." *Id.* at 522. Of course the "financial records . . . consulted" by Faith Center's "bookkeepers and accountants" and those "in which they made entries" include all of the church's financial records. And since all donors' names appear in the records either as "author" or "addressee," to answer the interrogatory entails a disclosure of these names.

Interrogatory No. 36, which requests Faith Center to "[i]dentify each contribution record" of Dr. Scott, *id.* at 894, implicates the same free exercise interests. Pastor Scott, of course, has no less an obligation than has any of his congregants to "do not your alms before men." *Matthew* 6:1. Indeed, for Scott to reveal his contributions, while teaching his followers the error of that course, would represent a breach of faith on his part. Any distinction between Dr. Scott and other donors would have a disastrous effect on his ability to lead his flock in the way of the Lord. *See* 3 Jt. App. 679, 685.

broad governmental probe into the financial affairs of petitioner and its donors resulting from the Bureau's first set of interrogatories. *Id.* At this point, according to the Commission, the dismissal of petitioner's "attempt to vindicate [its constitutional] claims judicially" "clearly put [petitioner] on notice that its constitutional claims" were without merit and "furnished no basis" for refusing to comply with the discovery requests. *Id.* at 43. The Commission concluded that then, and only then, did Faith Center's failure to comply with discovery orders go "beyond pursuing its legitimate and appropriate remedies and become an abuse of process warranting dismissal of its application." *Id.*[8]

The Commission also analyzed some of petitioner's constitutional arguments and itself found them wanting. *Id.* at 30-37.[9] Significantly, however, at no point did the Com-

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[8]Indeed, the FCC could not have been more explicit in this regard. It summarized its position as follows:

> "Viewing Faith's discovery performance in light of all of the circumstances, we conclude that Faith's renewal application should be dismissed. . . . While Faith's constitutional claims were not finally put to rest until the Court of Appeals summarily dismissed its appeal on these grounds, after that time Faith's continued unresponsiveness on those grounds to both rounds of discovery at issue is totally without justification. Faith's unresponsiveness prior to judicial dismissal of its appeal might not have warranted dismissal of its application. However, after that ruling Faith's continuing noncompliance with successive Orders to comply went beyond pursuing its legitimate and appropriate remedies and became an abuse of process clearly warranting dismissal of its application."

App. 51-52.

[9]For example, the Commission held that the first amendment contention that any alleged misrepresentations are immune from liability because they are statements of religious belief rather than of secular fact, *see United States v. Ballard*, 322 U.S. 78, 85-88 (1944), must be resolved at the renewal hearing, not at the discovery stage, because the argument is in essence a defense to the charges. App. 32-33. The Commission also determined that its proceeding was the least restrictive method of preventing religious fraud. App. 34. *See Cantwell v. Connecticut*, 310 U.S. 296, 306-07 (1940). The Commission further concluded that its proceeding did not entangle it in religious affairs and was consistent with *Surinach v. Pesquera de Busquets*, 604 F.2d 73, 76-79 (1st Cir. 1979). App. 34-35. Finally, the Commission held that the possibility that Faith Center's conduct regarding its financial affairs,

mission ever consider the existence or scope of the free exercise interests of Faith Center donors in not having their identity and the details of their contributions revealed.[10] This omission occurred even though the donor identity issue had been raised from the beginning of the case — prior to the June 15, 1978 By Direction letter — and continuously thereafter throughout the discovery proceedings. The absence of any consideration of this critical issue is perhaps explicable due to the Commission's erroneous belief that the By Direction letter had removed this issue from the case, *see id.* at 8. This conclusion was unquestionably mistaken since, as even the Bureau admitted, *e.g.*, 1 Jt. App. 233 n.2, both sets of interrogatories unquestionably required disclosing the identity of donors.[11]

In sum, the Commission dismissed the renewal proceedings based on its finding of petitioner's bad faith in the discovery process. This finding was largely predicated on petitioner's refusal to reveal the identity of its donors after the July 13 dismissal of its interlocutory appeal on jurisdictional grounds.

The United States Court of Appeals for the District of Columbia Circuit affirmed the decision of the Commission

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"while open to question from a purely secular point of view — if indeed open to question at all — was nevertheless protected by the First Amendment" because of its theology was also a defense that could properly have been presented at the hearing, but not at the discovery stage. App. 36.

[10]The Commission noted that in some contexts the first amendment protects membership records from disclosure. However, this observation was made in the course of rejecting Dr. Scott's free exercise arguments on the ground that this principle does not generally extend to an organization's officials. App. 37 n.63.

[11]Faith Center thereafter petitioned the Commission for rehearing on December 3, 1980, asserting that among other errors, the Commission erred as a matter of law in concluding that the Court of Appeals' July 13, 1979 summary dismissal put petitioner on notice that its constitutional claims were invalid. Petitioner pointed out that since the dismissal was indisputedly based on lack of jurisdiction, the Court of Appeals had no authority to, and therefore could not have, considered the merits of the appeal. 6 Jt. App. 1373, 1386. The petition for rehearing was denied on May 12, 1981, without any consideration of the donor disclosure issue or discussion of this blatant misinterpretation of the July 13 dismissal. App. 76-78. Petitioner thereafter timely noticed its appeal to the Court of Appeals.

in an unpublished *per curiam* order "generally for the reasons given by [the Commission]." Nos. 81-1648 & 81-1649 (D.C. Cir. Apr. 7, 1982) (App. 1). The Court of Appeals thus adopted the Commission's conclusion that of "critical significance" in justifying the ALJ's bad faith determination was petitioner's continued assertion of its donors' first amendment rights after the Court of Appeals dismissed Faith Center's attempted interlocutory appeal on these issues on July 13. Like the Commission, the Court of Appeals also failed to address the free exercise interests of petitioner's donors.[12]

Thus, petitioner's license was revoked for refusing to divulge membership information which petitioner maintained was protected by the first amendment. This revocation occurred without *any* consideration of the free exercise interests of petitioner's donors, either by the ALJ, the Commission on appeal, or the Court of Appeals.

C. Distress Sale.

Based on discussions with the Commission, the Bureau and the ALJ beginning as early as January, 1979 (*see* Brief of Appellant Faith Center, Inc. to Court of Appeals, Nos. 81-1648, 81-1649, at 15-16 (filed Nov. 24, 1981)), petitioner filed with the ALJ on October 30, 1979 a motion for a continuance of the renewal proceeding while petitioner exercised its right to petition the Commission for distress sale relief.[13] In its motion, petitioner explained that, unable to obtain a ruling on its constitutional claims, threatened

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[12]Faith Center's petition for rehearing and suggestion for rehearing *en banc* were denied on June 22, 1982. App. 3-4.

[13]The Commission originated the distress sale option in 1978 for the following reason: "[I]n order to further encourage broadcasters to seek out minority purchasers, we will permit licensees . . . whose renewal applications have been designated for hearing . . . to transfer or assign their licenses at a 'distress sale' price to applicants with a significant minority ownership interest. . . ." *See Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 F.C.C.2d 979 (1978) (footnote omitted).

with motions to dismiss, confronted with a massive new wave of discovery and lacking the resources to proceed, it had no alternative but to seek distress sale relief. 3 Jt. App. 587-96. The ALJ denied petitioner's continuance motion and dismissed the license renewal application before the Commission had an opportunity to rule on the distress sale petition. *Id.* at 631-32.

The Commission ultimately denied Faith Center's petition for distress sale relief in the same order in which the Commission affirmed dismissal of petitioner's renewal application. App. 5-68. This denial was based on the Commission's conclusion that petitioner's conduct during discovery had been in bad faith and that petitioner therefore should not have the benefit of a distress sale. App. 51-53. As stated in the denial of Faith Center's petition for reconsideration of the Commission's denial of the proposed distress sale "the Commission affirmed the [license renewal] dismissal . . . and, so as not to insulate [petitioner] from the consequences of its misconduct denied the distress sale proposal as to that station." App. 81. The Court of Appeals affirmed this ruling in its unpublished order discussed *supra*, for the same reasons stated by the Commission. *See* App. 1.[14]

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[14]*See* note 12, *supra*.

REASONS FOR GRANTING THE WRIT.

I.
THE QUESTIONS ARE IMPORTANT.

This petition concerns the manner in which the FCC treated the free exercise rights of members of an "electronic church" and the nature and extent of those rights in the discovery stage of license renewal proceedings. Specifically, the issues are whether, consistent with the first amendment and procedural due process, a central theological mandate requiring church followers to give donations in secret may be overridden without first requiring the Government to demonstrate a compelling interest in the identity of donors and the details of their giving. A related question is under what circumstances due process permits dismissal of administrative proceedings for alleged "bad faith" discovery performance. These issues, involving the scope of free exercise and due process rights of church broadcast licensees, are important questions of constitutional law which this Court has never directly addressed.

Churches are increasingly using electronic media as the principal means of disseminating their beliefs.[15] The need of both the FCC and these religious broadcasters for delineation of the constitutional contours of regulation in this area, the significance of the constitutional rights at stake, the drastic implications of the decision below on the exercise

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[15]The number of religious broadcasters cannot be precisely determined, but it is significant. There are 1,400 radio stations and 36 television stations that "specialize in religious broadcasts with religious radio stations starting up at the rate of about one a week and TV stations about one a month." Chandler, *The Electronic Church — Big Time Religion*, L.A. Times, Feb. 25, 1980, § 1, at 1, col. 1. This list does not include religious broadcasters who transmit via satellite and cable. *See id.* The roster of religious broadcasters includes both "independents" such as Billy Graham and Oral Roberts and clergymen affiliated with traditional denominations such as Rev. Robert Schuller (Reformed Church in America). *Id.* at 15, col. 3. In the near future, other traditional denominations are likely to enter the field. *See id.* at 17, col. 2 (United Methodist Church considering large-scale station ownership).

of the rights of all religious broadcasters, and the great value of the licenses at stake strongly suggest that review by this Court is not only appropriate, but necessary.

II.

THE DISMISSAL AND REJECTION OF DISTRESS SALE RELIEF DENY DUE PROCESS BECAUSE THE UNDERLYING FINDING OF BAD FAITH IS ERRONEOUS AS A MATTER OF LAW.

A. The Bad Faith Finding Rests Upon a Legally Erroneous Predicate.

"[T]here are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." *Societe Internationale pour Participations Industrielles et Commerciales v. Rogers*, 357 U.S. 197, 209 (1958). When a party is unable to comply with a pre-trial discovery request, "substantial constitutional questions are provoked." *Id.* at 210. Consequently, dismissal for "noncompliance with a pretrial production order" is proper *only* when "it has been established that failure to comply has been due to . . . willfulness, bad faith, or any fault" of the party. *Id.* at 212 (interpreting Fed. R. Civ. P. 37); *accord, National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 640 (1976) (per curiam).

The Commission found that only after the July 13, 1979 summary dismissal of petitioner's appeal to the District of Columbia Circuit did petitioner's discovery performance amount to bad faith and thus warrant dismissal of the proceedings. App. 51-52. The Commission attached "critical significance" to this dismissal by the Court of Appeals, reasoning that it was not until this time that petitioner was "clearly put on notice that its constitutional claims furnished

no basis for refusing to comply with the ALJ's determination as to the propriety of discovery requests. . . ." App. 43.[16]

The July 13, 1979 "summary dismissal . . . on constitutional grounds" thus is the linchpin of the Commission's bad faith determination. But for this dismissal, Faith Center's alleged failure to comply with discovery orders "might not have warranted dismissal" of the license proceedings.

However, *the July 13, 1979 dismissal of petitioner's appeal was not on the merits*, much less on constitutional grounds. The Commission had filed a motion to dismiss the appeal on the basis that the Court of Appeals lacked jurisdiction to hear it, arguing that the ALJ's interlocutory rulings were not final orders appropriate for review. App. 71-74. The Court of Appeals explicitly granted that motion and accordingly "dismissed" the appeal for lack of jurisdiction. App. 75; *see English v. Cunningham*, 282 F.2d 839 (D.C. Cir. 1960) (per curiam). It is elementary that there is no consideration of the merits when an appeal is dismissed on jurisdictional grounds. *Furr's Cafeterias, Inc. v. NLRB*, 566 F.2d 505, 507 (5th Cir. 1978).

Hence, the Commission's finding of "bad faith" was based on an essential and manifestly false premise — that the order of the Court of Appeals "put to rest" petitioner's constitutional claims. App. 51. The Commission admits that but for this "critically significant" assumption, a finding of "bad faith" is unwarranted. *See* note 8, *supra*. Since the bad faith finding is indefensible because it is predicated on a legally erroneous interpretation of the nature of the July 13 order, both the dismissal of petitioner's license renewal

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[16]The Commission also refers to its By Direction letter as possibly putting Faith Center on notice that its constitutional objections to discovery were meritless. This letter, however, explicitly disclaims any intention to seek donor records at that time. *See* note 4, *supra*. At least as to donor records, therefore, Faith Center was never "put on notice" that its objections lacked validity until, at the earliest, the dismissal of its application by the ALJ.

proceedings and the denial of distress sale relief are similarly indefensible. For, absent the finding of bad faith, dismissal of these administrative proceedings without affording petitioner an opportunity to present its constitutional claims and be heard on the merits was a blatant denial of due process of law.

B. Due Process Requires That First Amendment Objections to Discovery Be Adjudicated Prior to The Imposition of Sanctions.

The fundamental due process right to be heard[17] demands that sanctions not be imposed for attempting to vindicate first amendment claims which are far from frivolous. *Cf.* Fed. R. Civ. P. 37(a)(4) (sanctions not to be imposed for objection to discovery if party's position was substantially justified). That petitioner's first amendment objections were certainly substantial, highlights the gravity of this deprivation here. The refusal to disclose donor identities that precluded complete responses to the Bureau's discovery requests was firmly rooted in the free exercise clause of the first amendment. *See* § III, *infra*. Under these circumstances, a party should not be forced to wager valuable secular interests upon the prospect that his free exercise rights will ultimately be upheld.[18] Yet this Hobson's choice is precisely what was forced upon petitioner.[19]

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[17] *Grannis v. Ordean*, 284 U.S. 385, 394 (1914); *accord, Goldberg v. Kelly*, 397 U.S. 254, 267 (1970); *see Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 165-72 (Frankfurter, J. concurring).

[18] Putting a party "to a choice between fidelity to religious belief" and the *risk* of loss of a secular entitlement has a "coercive impact" on the free exercise of religion, *Thomas v. Review Bd.*, 450 U.S. 707, 717 (1981), different only in degree from the coercive impact of the actual choice between fidelity to religious belief and the certainty of secular loss. *Cf., e.g., Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967) ("chilling effect" of threat of sanctions upon protected expression).

[19] The secular interests here at stake involve considerably more than the license to operate station KHOF-TV. Petitioner is a licensee of two other television stations and one FM radio station. App. 60. Both the Bureau and the Review Board have already made clear in license renewal

(footnote continued on following page)

Repeatedly stating that petitioner's religion clause claims were not assertable during discovery proceedings, the ALJs never ruled on these constitutional claims. *See* Statement of the Case, *supra*. Neither did the Commission consider petitioner's donor disclosure claims. *See id.* The ALJ and the Commission thus put Faith Center in the unconscionable position of either foregoing the religious privacy objections of the Church and its members — claims never adjudicated or ruled upon — or insisting on its right to a ruling on those objections, thereby risking dismissal of its renewal application and loss of its television station. That petitioner's claims could be raised after discovery is no answer to this dilemma since it is the exposure of private religious matters in violation of the free exercise clause that constitutes the constitutional damage. This damage occurs when the disclosure takes place and is irreparable. Even a later ruling in favor of petitioner could not undo the constitutional wrongs already wrought. The only viable means to protect these constitutional rights is to prevent disclosure in the first instance by requiring an immediate ruling on the merits of the constitutional claims.

This Court has often recognized that "the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." *See, e.g., Speiser v. Randall*, 357 U.S. 513, 520-521 (1958). Accordingly, the Court has evolved a series of specific due process rules carefully designed to prevent insensitive procedural devices from infringing upon first amendment interests. *See* Monaghan, *First Amendment "Due Process"*, 83 Harv. L. Rev. 518 (1970). Because first amendment rights are "vulnerable

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proceedings involving the FM station that they consider all constitutional claims raised in the TV proceeding res judicata and therefore they will not permit petitioner to assert those claims in any subsequent proceedings involving petitioner's other licenses. *See* App. 86-87. Thus, because of a constitutionally deficient proceeding involving one license, petitioner will lose all of its other licenses as well.

to gravely damaging yet barely visible encroachments," governmental intrusions on such interests must "embody the most rigorous procedural safeguards." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963).

Compelled disclosure of private associational matters constitutes not merely a "barely visible encroachment," but a "significant" encroachment. *See Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (plurality opinion). Indeed, precisely because compelled disclosure of such matters can be an "effective restraint" on freedom of association, *see NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958), such disclosure must be subject to "exacting scrutiny." Thus, it necessarily follows that disclosure which implicates fundamental first amendment interests should be preceded by an adjudication of its constitutional validity. *See Freedman v. Maryland*, 380 U.S. 51 (1965); *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964).

The same is obviously true when, as here; disclosure would effectively restrain free exercise rights. Petitioner simply sought to vindicate the free exercise rights of its members. To do so, petitioner needed to obtain an adjudication of these religious privacy claims during discovery prior to compelling disclosure of donor information. Since petitioner was not given this opportunity, its members did not receive the due process which the first amendment requires. In the absence of an adversary determination of petitioner's constitutional claims, based on meticulous scrutiny of the Bureau's showing of its need for discovery prior to compulsory disclosure, the orders compelling that disclosure and the resulting dismissal of the renewal application and rejection of distress sale relief are constitutionally invalid.

Moreover, when a party resists discovery precisely in order to obtain a ruling on his first amendment objections, he should not be required to do so at his peril. Otherwise, "[t]he threat of sanctions may deter" the assertion of valid

first amendment privileges "almost as potently as the actual application of sanctions" would do. *NAACP v. Button*, 371 U.S. 415, 433 (1963); *see New York Times Co. v. Sullivan*, 376 U.S. 254, 277-80 (1964) (inhibiting effect of libel awards on vigorous public debate necessitates constitutional privilege). "[F]irst amendment due process," *Monaghan, supra*, at 551, therefore requires that a party not be sanctioned for seeking an adjudication of his first amendment privacy rights.

III.

COMPELLED DISCLOSURE OF THE IDENTITY OF FAITH CENTER DONORS VIOLATES THE FREE EXERCISE CLAUSE.

A. The Free Exercise Clause Requires All Possible Accommodation Between Religious Exercise and Secular Regulation.

The Government may restrict religiously motivated behavior only if a "compelling state interest" is served. *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). "[N]o showing of a rational relationship to some colorable state interest . . . suffice[s]; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation' . . . ." *Id.* The Government also must show that no alternative means exist that would achieve its end "without infringing First Amendment rights." *Id.* at 407.

The requirement that a compelling governmental interest be shown if free exercise of religion is to be abridged embodies the perception that only the most imperative demands of public order "in the nature of things" require restrictions of religious freedom. "[T]he essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *accord, Thomas v. Review Board*, 450 U.S. 707, 718

(1981). The decisions holding such claims to be overbalanced "have invariably" rested on the existence of a "substantial threat to public safety peace or order." *Sherbert, supra*, 374 U.S. at 403. Thus, even such paramount government interests as compulsory education of youth, *Yoder, supra*, 406 U.S. at 221, or the uniform application of narcotics laws, *e.g., People v. Woody*, 61 Cal.2d 716, 723-26; 394 P.2d 813, 818-20, 40 Cal.Rptr. 69, 74-76 (1964), must yield to the dictates of conscience.

B. Giving "In Secret" to Faith Center Unquestionably Implicates Free Exercise Values.

That donating to Faith Center constitutes religious exercise cannot be seriously controverted. The Faith Center follower is commanded to "[l]ay not up . . . treasures upon earth," *Matthew* 6:19, but instead to "lay up . . . treasures in heaven," *id.* 6:20.[20] "[T]he means of laying up treasures in Heaven is to give them to His church and to the ministries of His church under the direction of the ministers ordained to be responsible for His church." 1 Jt. App. 181. By the very act of giving, the donor expresses his belief that he is laying up "treasures in Heaven" following the example of the early Christians, *see Philippians* 1:1, by making "a sacrifice acceptable, well pleasing to God," *id.* 4:18, to His church, and to its ministries under the direction of His ministers. *See also Philippians* 4:17 (gift is made so that "fruit may abound" to eternal account of donor).

That the identity of the donor and the details of this donation be disclosed to no one other than the ministers of the Lord is of the utmost importance. If there is to be a spiritual as well as an eternal reward for a donor's faith-action, his contribution *must* be "in secret" known only to

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[20]To the Faith Center adherent material well-being is a decidedly secondary concern when compared to his spiritual well-being. *See Matthew* 6:28-31 (believers should not worry about material things "for like the lilies of the field," God shall clothe those who have faith).

Him who "seeth in secret himself" but "who reward[s] openly." *Matthew* 6:4.[21] Thus, if a donor's gift should become known, he will "have no reward" in Heaven. *Id.* 6:1. For this reason, the pledge receipts under which all donations are made represent that petitioner will maintain the confidentiality of all information regarding donors and their donations. *See* App. 88.

Compelled disclosure of the identity of petitioner's donors and the details of their contributions therefore directly violates a central tenet of Faith Center's religious teachings and of its donors' religious beliefs. Hence, such disclosure may be justified only by a showing of a compelling governmental interest achievable by no less restrictive means.

C. The FCC Did Not Demonstrate a Compelling Government Interest Sufficient to Justify Compelled Disclosure of Donor Records.

The orders compelling disclosure of donor information unquestionably inflict grave harm upon a constitutionally protected interest, possibly the most fundamental of all constitutional rights.[22] This harm to free exercise is even more direct and just as insidious as the harm to the associational interests at issue in *NAACP v. Alabama ex rel. Patterson*, *supra*, 357 U.S. at 463. The harm found in *NAACP* flowed from the likelihood "of the consequences of . . . exposure" of beliefs that would result from compelled disclosure of

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[21]The remainder of the Biblical passage upon which this belief is based emphasizes the need for secrecy and privacy.

> "Therefore when thou doest thine alms, do not sound a trumpet before thee, as the hypocrites do in the synagogues and in the streets, that they may have glory of men. Verily I say unto you, they have their reward. But when thou doest alms, let not thy left hand know what thy right hand doeth: That thine alms may be in secret. . . ."

Matthew 6:1-4.

[22]*Jones v. Opelika*, 316 U.S. 584, 621 (1942) (Murphy, J., dissenting), *adopted per curiam as majority opinion*, 319 U.S. 103, 104 (1943).

the names of members of the organization. *Id.* at 462. The possible consequences of such disclosure included "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *Id.* That these consequences would ensue was readily inferable from the "uncontroverted showing" that they had resulted from revelation of the identity of members "on past occasions." *Id.* In the instant case, the harm resulting from donor disclosure is a virtual certainty since it is the disclosure itself that contravenes the free exercise rights in question. Thus, it necessarily follows that here, as in *NAACP*, compelled disclosure violates the first amendment unless a compelling governmental interest is shown.[23]

The protections of *NAACP* were subsequently extended to cover the identity of financial supporters and donors as well as members. *Buckley v. Valeo, supra,* 424 U.S. at 71. In *Buckley,* the harm to the constitutional interest stemmed from the recognition that "[i]n some instances" disclosure can "deter contributions to the point where the movement cannot survive." *Id.* This reasoning applies with even greater force in this case because compelled disclosure would deter donations and therefore destroy the theological under-pinnings of petitioner's religious movement. *See* § IIIB, *supra.*[24]

[23]*NAACP* is conclusive evidence that an adjudicatory system can accommodate carefully monitored first amendment exemptions from discovery demands. This critical feature renders *United States v. Lee,* 102 S.Ct. 1051 (1982), inapposite since *Lee* rejected a free exercise-based objection to taxation because the tax system could not otherwise function and no accommodation was therefore possible. *Id.* at 1056.

[24]For a recent case holding that compelled disclosure of information almost identical to that sought by the FCC here violates the right of associational privacy, *see FEC v. Hall-Tyner Election Campaign Committee,* 678 F.2d 416, 418 (2d Cir.), *petition for cert. filed,* 51 U.S.L.W. 3099 (U.S. Oct. 4, 1982) (No. 82-198).

This Court is currently considering the degree of probability of harm to the exercise of associational rights necessary to invoke the right of privacy created by *NAACP* — whether "only isolated instances of harassment directed to the organization or its members" within a particular state in recent years is sufficient. *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, No. 81-776 (U.S. argued Oct. 4, 1982) (Jurisdictional Statement i). Resolution of this issue will likely prove, as petitioners assert, that the protections afforded by *NAACP* and *Buckley* apply to all cases in which there is "a reasonable probability," *Buckley*, 424 U.S. at 74, that the exercise of any first amendment right, especially a right as important as free exercise, will be chilled by disclosure of the identities of financial contributors.

Whether or not *Brown* directly addresses this question, it cannot be denied that the "consequences of exposure" of the identities of Faith Center donors will be devastating to the free exercise of religion. *See* § IIIB, *supra*. Therefore, the Government must demonstrate "an interest in obtaining the disclosures it seeks from petitioner which is sufficient to justify the deterrent effect . . . which these disclosures may well have on the free exercise by petitioner's members" of their religion. *NAACP*, *supra*, 357 U.S. at 463. That interest, moreover, must be "compelling." *Thomas v. Review Board*, *supra*, 450 U.S. at 718 *Sherbert v. Verner*, *supra*, 374 U.S. at 406.[25]

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[25]The Government must demonstrate that the information sought goes to the "heart of the matter" and was crucial to its case. *See Zerilli v. Smith*, 656 F.2d 705, 713 (D.C. Cir. 1981); *UAW v. Nat'l Right to Work*, 590 F.2d 1139, 1153 (D.C. Cir. 1978); *Carey v. Hume*, 492 F.2d 631, 636 (D.C. Cir.), *cert denied*, 417 U.S. 938 (1974). In addition, the Government must demonstrate that it has exhausted all other alternative sources for acquiring the information. *See UAW v. Nat'l Right to Work*, *supra*, 590 F.2d at 1153; *cf.*, *Zerilli v. Smith*, *supra*, 656 F.2d at 713; *Carey v. Hume*, *supra*, 492 F.2d at 636; *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1978); *Baker v. F & F Investment Co.*, 470 F.2d 778, 784 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *Miller v. Transamerica Press, Inc.*, 621 F.2d 721, 726 (5th Cir. 1980).

Neither the opinion of the ALJ, *see* 4 Jt. App. 894, nor that of the FCC, *see* App. 43-51, evidences any particularized need on the part of the Broadcast Bureau for the material which Faith Center could not provide without impinging upon the free exercise interests of its followers. Indeed, except for the donation records of the pastor of Faith Center,[26] the matter was not considered directly at all.[27] Furthermore, far from requiring the Bureau to demonstrate a compelling governmental interest, the Commission placed the burden of proof on petitioner generally to "demonstrat[e] that specific discovery requests are . . . irrelevant to the Commission's legitimate inquiry." App. 37.[28] Since the existence of a compelling governmental need

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[26]The Commission's entire discussion of this subject, which arises in the context of rejecting the contention that the initial exemption of donor records in its By Direction letter applied to Dr. Scott, is that "[t]he distinction between Dr. Scott's records and the records of rank and file contributors has always been clear." App. 44. Why the distinction is "clear" is not explained, nor is there any attempt to establish a greater need to override Dr. Scott's free exercise interests than the free exercise interests of the rank and file.

[27]Since the Bureau did not make the required showings justifying compelled disclosure below, it is unclear on the record as it now stands whether the Bureau or Faith Center will prevail on the constitutional claims. Although the FCC mentioned discovery derelictions other than those arising from Faith Center's continued assertion of its constitutional claims, the FCC deemed that continued assertion after the July 13 dismissal of petitioner's appeal to be the fundamental justification for the dismissal of the license renewal proceeding. *See* § IIA, *supra*. Moreover, where, as here, it is possible that the administrative law judge and the FCC rested the dismissal on a constitutionally improper basis, reversal is required. *Cf., e.g., Bachellar v. Maryland*, 397 U.S. 564, 569-71 (1970); *Stromberg v. California*, 383 U.S. 359, 369-70 (1931).

[28]Moreover, without detailed fact findings, it would be impermissible even to assess the competing interests at stake. The ALJ made no findings at all concerning the secrecy interests of Faith Center adherents, no evaluation of the sincerity or centrality of those beliefs, and no assessement of the strength of the Broadcast Bureau's need to violate them other than an elementary evaluation of the relevance of the discovery demands. Only with such factual findings could the FCC and the Court of Appeals determine whether petitioner's discovery performance demonstrated bad faith. The lack of findings therefore renders the dismissal of petitioner's renewal application and rejection of its distress sale proposal a gross denial of due process.

was not even addressed, much less found, the discovery orders and the dismissal of petitioner's license renewal proceeding for failure to comply with those orders cannot stand.

CONCLUSION.

For each of the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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APPENDIX A.

Judgment.

United States Court of Appeal for the District of Columbia Circuit.

September Term, 1981.

Faith Center, Inc., Appellant, v. Federal Communications Commission. No. 81-1648 & No. 81-1649. FCC 81-235.

Filed: April 7, 1982.

Appeals from Orders of the Federal Communications Commission. Before WRIGHT, WILKEY, and WALD, Circuit Judges.

These causes came on to be heard on appeal from the Federal Communications Commission and were briefed and argued by counsel. The issues presented have been accorded full consideration by the court; they occasion no need for an opinion. *See* Local Rule 13(c).

This court is in agreement with the result reached by the Commission, generally for the reasons given by it in *Faith Center, Inc.*, 82 FCC2d 1 (1980), *reconsideration denied*, FCC 81-235 (1981) (Joint Appendix 1333, 1925). *See United States v. Lee*, ... U.S. ..., ..., 50 U.S.L.W. 4201, 4204 (Feb. 23, 1982); *King's Garden, Inc. v. FCC*, 498 F.2d 51, 60 (D.C. Cir. 1974). *See also Faith Center, Inc.*, 69 FCC2d 1123, 1126-1127 (1978) (JA 49, 52-53) (FCC's "By Direction" Letter of June 15, 1978); *cf. Black Panther Party v. Smith*, 661 F.2d 1243 (D.C. Cir. 1981). We find no abuse of discretion or procedural default.

On consideration of the foregoing, it is ORDERED and ADJUDGED by this court that the orders of the Federal Communications Commission appealed from in these causes are hereby affirmed.

Per Curiam
For the Court
/s/ George A. Fisher
George A. Fisher
Clerk

APPENDIX B.

Order.

United States Court of Appeals for the District of Columbia Circuit.

September Term, 1981.

Faith Center, Inc., Appellant, v. Federal Communications Commission, Appellee. No. 81-1648.

And consolidated case No. 81-1649.

Filed: June 22, 1982.

Argued: 3-29-82.

BEFORE: Wright, Wilkey and Wald, Circuit Judges

The Clerk is directed to file appellant's petition for rehearing and on consideration thereof, it is

ORDERED that the aforesaid petition is denied.

Per Curiam

FOR THE COURT:
George A. Fisher,
Clerk
BY: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

APPENDIX C.

Order.

United States Court of Appeals for the District of Columbia Circuit.

September Term, 1981.

Faith Center, Inc., Appellant, v. Federal Communications Commission, Appellee. No. 81-1648.

And consolidated case No. 81-1649.

Filed: June 22, 1982.

Argued: 3-29-82.

BEFORE: Robinson, Chief Judge; Wright, Tamm, MacKinnon, Wilkey, Wald, Mikva, Edwards, Ginsburg and Bork, Circuit Judges.

The Clerk is directed to file appellant's suggestion for rehearing *en banç* and on consideration thereof, and no judge of the Court having called for a vote thereon, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam

FOR THE COURT:
George A. Fisher,
Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

APPENDIX D.

Memorandum Opinion and Order.

Appeal, From Initial Decision, Sustained
Licensee, Effect of Misconduct
Renewal, of License, Denied or Dismissed

Commission sustains ALJ's order dismissing broadcaster's renewal application and denies petition for special relief. Licensee did not participate in discovery phase in good faith and consistently failed to answer interrogatories and failed to produce documents. BC 78-326

FCC 80-602

Before the Federal Communications Commission, Washington, D.C. 20554.

In re Application of Faith Center, Inc. Station KHOF-TV San Bernardino, California. BC Docket No. 78-326. File No. BRCT-746.

For Renewal of License,

(Adopted: October 9, 1980; Released: November 14, 1980)

By the Commission: Commissioner Jones absent.

I. Background

1. Faith Center, Inc. (Faith) appeals from an order of Administrative Law Judge Edward Luton dismissing Faith's application for renewal of its license to operate station KHOF-TV, Channel 30, San Bernardino, California.[1] Also before the Commission for consideration of Faith's petition for special relief, filed February 29, 1980, proposing a

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[1]FCC 80M-459, released March 7, 1980. Faith filed its appeal May 7, 1980, the Broadcast Bureau filed an opposition on June 12, Faith replied on July 21, the Broadcast Bureau commented on the reply August 22, and Faith and TELACU filed further comments on September 17.

"distress sale" of KHOF-TV and two co-owned stations, KVOF-TV, Channel 38, San Francisco, California, and WHCT-TV, Channel 18, Hartford, Connecticut.[2] The parent corporation of the proposed minority purchasers, The East Los Angeles Community Union (TELACU), on May 7, 1980, appealed the dismissal order and simultaneously renewed an earlier motion to intervene in these proceedings.[3]

2. Faith is as a nondenominational Christian Church founded in 1947 and headquartered in Glendale, California. Faith and an affiliated church also involved in these proceedings, Wescott Christian Center (Wescott), are members of the Full Gospel Fellowship of Churches International. Dr. W. Eugene Scott serves as the president and pastor of Faith and Wescott and the president of the Full Gospel Fellowship. Faith received licenses to operate KHOF-FM in 1957 and KHOF-TV in 1972. Faith acquired WHCT-TV in 1972 and KVOF-TV in 1973.

3. By Order and Notice of Apparent Liability, FCC 78-674, released October 11, 1978, the Commission designated Faith's renewal application for hearing. Four issues were designated:

(a) To determine all the facts and circumstances surrounding Faith Center, Inc.'s failure to permit Commission access to certain licensee books, records and employees.

(b) To determine whether Faith Center, Inc., failed to submit information requested by the Commission in the Commission's letter dated June 15, 1978.

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[2]Supplements to the petition were filed March 3, March 21, and April 29. The Broadcast Bureau filed statements March 11, May 9, and July 10 to which Faith and TELACU responded July 22. Assignment applications covering the three stations were filed April 25.

[3]TELACU originally addressed a motion for leave to intervene to the Presiding Judge on March 13, 1980.

(c) To determine whether in its over-the-air fund-raising broadcasts, Faith Center, Inc., violated, or is in violation of, Title 18, United States Code Section 1343.[4]

(d) To determine, in light of the evidence adduced under the preceding issues, whether the applicant possesses the requisite qualifications to be or to remain a licensee of the Commission, and whether a grant of a captioned application would serve the public interest, convenience and necessity."

The order also served as a notice of apparent liability in the amount of up to $20,000.

4. Pursuant to the designation order, the Broadcast Bureau, on November 9, 1978, filed a bill of particulars. The bill of particulars recites that on September 19, 1977, Commission investigators visited the licensee's offices in Glendale, California, and informed the licensee's personnel that they were investigating allegations that KHOF-TV had been used to solicit funds for specific purposes and that the funds collected were not expended as indicated in the over-the-air solicitations. The investigators requested the licensee to provide accounts receivable ledgers, lists of solicitations and monies received and records of money spent on each project for which funds were solicited, and asked to interview bookkeeping personnel. These requests were refused. In an October 31, 1977 letter, the Commission, specifically, the Broadcast Bureau's Complaints and Compliance Divi-

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[4] "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both." 18 U.S.C. §1343 (1977).

sion, requested Faith to submit copies of cash receipts and disbursements journals, a list of projects for which funds were solicited, a list of expenditures made on these projects, a list of former station employees, a list of Dr. Scott's own pledges and contributions to Faith, a statement of the dates of solicitations made by Dr. Scott, a statement of what representations were made as to how the money raised would be spent, a statement of how much money was received or pledged in response thereto, the period of time in which the money was received, a list of people making contributions or pledges, and a statement that licensee employees would be available for interviews. Faith did not submit the requested information. Finally, by two letters, Commission staff requested Faith to make available videotapes of its "Festival of Faith" program on which solicitations of funds were made. Faith initially replied that to do so would be burdensome and expensive, but later replied that any existing tapes were the property of its sister church, Wescott. These facts formed the basis of issue (a).

5. Issue (b) relates to a letter by the Commission[5] to Faith rejecting Faith's constitutional arguments and requesting the licensee to submit the information previously requested with some modifications.[6] Faith failed to submit all of the information requested, including the cash receipts and disbursement journals, specific evidence that expenditures for the various projects were ever made, and a list of pledges and contributions of Dr. Scott.

6. Issue (c) arises from allegations received by the Commission in August 1977 concerning Faith's fundraising

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[5]By direction of the full Commission. FCC 78-434, released June 15, 1978, 69 FCC 2d 1123 (1978).

[6]At this point the Commission no longer requested Faith to submit the names of all persons pledging or contributing funds.

practices. These allegations were that Faith had raised money for specific projects which were never carried out. The allegations concerned fundraising appeals for audio equipment, studio lights, roof repairs, and a "fountain of faith". It was also alleged that Dr. Scott had used money raised through over the air fund solicitation for his own use by giving it to other organizations, primarily Wescott and the Sunset Mausoleum, in which he had interests, and that fundraising appeals were accompanied by false statements that Dr. Scott contributed his own funds and that he received only $1.00 a year from the church.

7. Two aspects of the procedural history of this case are central to the matters now before the Commission. These are Faith's response to the Broadcast Bureau's discovery attempts and Faith's request for distress sale relief. At a prehearing conference on December 13, 1978, the presiding judge Daniel Head set a hearing date of March 20, 1979 and directed Faith to respond by January 15, 1979, to interrogatories and a motion for the production of documents filed December 8, 1978 by the Broadcast Bureau.[7]

8. These dates were modified at a second prehearing conference, January 19, 1979, the hearing date extended to June 26, 1979, and the response date extended to February 1, 1979.[8] Moreover, the presiding judge noted that on January 10, 1979 Faith had declared in a letter that it was considering the possibility of a distress sale. The letter stated that Faith would inform the ALJ of its distress sale election by February 27, 1979.[9] The ALJ indicated that time was

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[7]FCC 78M-1896, released December 20, 1978.

[8]FCC 79M-123, released January 24, 1979.

[9]Faith represented in the letter: "Assuming that the hearing is not continued on other grounds . . . or that a request for such continuance is not pending, the licensee will undertake to advise the Commission on or before February 27, 1979, whether it intends to seek out a minority purchaser."

being extended to June 26 as an accommodation to Faith and that if Faith waited until May or June to seek distress sale relief he would take into account the time extended in assessing any such request.[10]

9. Thereafter, on February 1, 1979 Faith responded to the Bureau's discovery requests, but the Bureau found these responses inadequate in several respects and filed a motion to compel on March 2, 1979. The ALJ granted the Bureau's motion insofar as it sought information concerning the amounts of money donated that were actually dedicated or extended for the projects for which they were donated and the dates of such expenditures. He also found that Faith had not provided information about the amounts of funds spent for Dr. Scott's personal use or the dates of such expenditures. Finally, the ALJ found that Faith had refused to answer interrogatories on constitutional grounds which had been rejected at the prehearing conference.[11]

10. Faith sought to appeal the ALJ's orders to the Commission, but the ALJ declined to grant Faith leave to appeal.[12] Faith also filed an appeal and requested a stay before the Court of Appeals. There Faith argued that in the absence of properly filed charges, the Bureau's discovery requests constitute an unreasonable search and seizure in violation of the Fourth Amendment. It argued further that the requests violated the Church's First Amendment rights and would

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[10]See Tr. 86. Faith's statements of its intentions at this point and the presiding judge's directives are disputed. *See* paras. 75 *et seq., infra.*

[11]FCC 79M-456, released April 9, 1979, FCC 79M-470, released April 11, 1979.

[12]FCC 79M-584, released May 11, 1979. In so doing the ALJ concluded that the appeal of the discovery requests did not present any new or novel question of law that would require remand and that since Faith's right to press its constitutional claims is retained, it did not seem likely that a remand would be required even if there were errors in the discovery requests.

result in an unwarranted entanglement by the Commission in church activities and affairs. On July 13, 1979, the Court summarily dismissed Faith's appeal and denied the stay motion.[13]

11. While the appeal was pending before the Court of Appeals, Judge Head withdrew from the case and was replaced by ALJ Edward Luton, and the hearing date was continued indefinitely. Throughout these events, Faith made no further mention of any intention to have a distress sale.

12. Within a week of the court's decision, on July 18, 1979, Faith filed further responses to the Broadcast Bureau's first round of discovery. The Bureau again found the responses inadequate and filed a motion to compel. On August 6, 1979, Judge Luton found that Faith's responses were inadequate and ordered additional responses to August 17, 1979. (Generally, the interrogatories in question sought information about the amount of funds collected as a result of Faith's solicitations, the amount actually dedicated to the projects for which the money was solicited, the amount of contributions turned over to Wescott Christian Center Church, and the extent to which Dr. Scott honored pledges of his own funds.) The ALJ also scheduled commencement of the evidentiary hearing for November 27, 1979.[14]

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[13]Order, No. 79-1478 (D.C. Cir. July 13, 1979). The presiding judge denied Faith's request for a stay *Pendente lite*. FCC 79M-778, released July 6, 1979.

[14]FCC 79M-901, released August 6, 1979; FCC 79M-916, released August 8, 1979; FCC 79M-943, released August 15, 1979. In the August 6, 1979 Order the Judge ordered that Faith submit full and complete responses to the inquiries about: (1) how much of the money raised for each particular project or cause was dedicated for or expended for such project and the date of such expenditures; (2) were any of the funds raised transferred to, given to, committed to, or in any other manner turned over to the Wescott Christian Center Church? If so, set forth the purpose for each such transaction and the date and amount of funds involved in each such transaction; (3) state what representations were made by Dr. Scott in each instance of a solicitation as to a pledge of

(footnote continued on following page)

13. On July 30, 1979 the Bureau filed a motion to dismiss Faith's renewal application because of Faith's repeated failure to comply with discovery Orders.

14. On August 17, 1979 Faith filed responses to the Bureau's interrogatories as mandated by the ALJ. However, the Bureau still found Faith responses inadequate and so indicated on August 22, 1979, in a request for ruling on its previous motion to dismiss.[15]

15. On October 1, 1979, the Bureau filed its second set of interrogatories and a motion for production of documents. Generally described, these interrogatories sought information about the identity of programs during which solicitations were made, financial records concerning fundraising projects, funds used for specific projects, segregation of solicited funds from other funds, financial records pertaining to Faith in Wescott's possession, the identity and responsibilities of the officers and directors of Faith, the existence and location of "Festival of Faith" program tapes and the expenses and contributions of Dr. Scott. Faith objected to all of the interrogatories as unduly burdensome both in terms of quantity and timeliness, all of the interrogatories as defective in form, all of the document production as premature,

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his own funds; (4) set forth the date of each such representation, the amount pledged and the project or cause for which the money was pledged; (5) state the statuts of each pledge identified, including dates of satisfaction and amounts, pledges withdrawn and pledges presently outstanding and the amounts of the balances; and (6) state in detail how monies received as a result of each of the pledges was expended. Additionally, he ordered that Faith produce videotapes of Dr. Scott's program "Festival of Faith" during the period September 1976 through and including November 1976. (These latter items had been called for in three Memoranda Opinion and Order, released April 11, May 11 and July 6, 1979).

[15]While the presiding judge did not order further discovery in response to the Broadcast Bureau's first round of interrogatories and document requests he indicated in later orders that he was still not fully satisfied with Faith's responses. FCC 79M-1466, December 4, 1979; FCC 80M-459, released March 11, 1980.

certain interrogatories as irrelevant and not calculated to lead to the discovery of admissible evidence, two interrogatories on the grounds the information sought could have been requested long ago and one interrogatory as constituting an abuse of the discovery process.

16. On October 30, 1979 Faith sought a continuance to negotiate a distress sale, an election it had previously undertaken to make by February 27, 1979.[16] The ALJ denied the continuance on November 13 because of Faith's failure to pursue distress sale relief earlier in the proceeding as it had indicated it would. Since considerable Commission resources had already been expended and, since the hearing was imminent, the ALJ deemed Faith's motion untimely, indicating that the Commission's distress sale policy did not contemplate an "on again off again approach."[17]

17. On December 4, 1979, the ALJ rejected Faith's objection to the Bureau's second set of interrogatories and document requests and directed Faith to respond within two weeks.[18] In his Order the ALJ observed that Faith had failed to comply with previous discovery orders and warned that if Faith failed to comply strictly with the present order, he would seriously consider granting the Bureau's motion to dismiss Faith's application. With respect to the Bureau's second set of interrogatories, the ALJ noted that Faith had not answered a single interrogatory and that Faith's objections consisted largely of generalized complaints.

18. On December 13 Faith filed an appeal of the ALJ's Order and asked the Commission to stay the deadline for Faith's discovery response pending disposition of the appeal. On December 18, Faith filed additional responses to

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[16]*See* note 9, *supra*.

[17]FCC 79M-1346, released November 13, 1979.

[18]FCC 79M-1466, released December 4, 1979.

the Bureau's second set of interrogatories. On December 28, the Commission, by FCC 79-875, denied Faith's stay motion on the grounds that Faith had not shown that it would be irreparably harmed if the stay were denied.

19. On January 14, 1980, Faith again notified the ALJ of its election to pursue a distress sale and requested a continuance on this basis. On January 17, the ALJ ordered Faith to supplement its responses to the Bureau's third set of interrogatories, served on November 26, 1979 and initially responded to December 10, 1979, by February 1, 1980. Faith filed a response by that date, and on February 7 the ALJ set the hearing for April 1, 1980.

20. On February 29 Faith filed a petition for special relief proposing a distress sale not only of KHOF-TV but also of co-owned stations KVOF-TV San Francisco, California, and WHCT-TV Hartford, Connecticut, to subsidiaries of The East Los Angeles Community Union (TELACU), a hispanic controlled organization. The presiding judge refused to hold the proceedings in abeyance because he concluded that the distress sale request was untimely and because of the imminence of the hearing.[19] He further indicated that Faith had had "plenty of time to pursue the distress sale long ago" and "made an apparent election not to do so."

21. The presiding judge then dismissed Faith's renewal application for failure to prosecute and terminated the proceeding. In so doing the ALJ reviewed the course of the discovery proceedings and found a pattern of inadequate "piecemeal, partial and minimal" discovery on Faith's part. This had occurred, concluded the ALJ, notwithstanding

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[19]FCC 80M-426, released March 12, 1980. A motion filed by TELACU on March 13, 1980 also asking that the proceedings be held in abeyance has not been acted on.

numerous discovery orders mandating strict compliance and granting several extensions of time. An examination of several of Faith's responses to interrogatories convinced the ALJ that Faith's answers were contrived to avoid full and candid disclosure to the Commission, and represented a studied effort to avoid producing any information which could be at all harmful to its case. In view of this bad faith, and Faith's failure to comply strictly with the latest discovery order, the ALJ concluded that Faith's renewal application should be dismissed with prejudice and the proceedings terminated.

22. Faith's appeal alleges several grounds for reversal of the ALJ's dismissal. These are in the order we shall consider them: (1) the designation order and bill of particulars below did not comply with §309(e) of the Communications Act; (2) the designation of issues (a) and (b) violated the "Wiley Guidelines"; (3) the solicitations at issue are protected from government scrutiny by the First Amendment and Faith was entitled to a ruling on all of its constitutional claims during discovery; (4) Faith substantially complied with discovery; (5) the Broadcast Bureau's conduct denied Faith due process; and (6) the dismissal abrogated the Commission's distress sale policy. TELACU's appeal makes essentially the same arguments as Faith does with respect to the Commission's distress sale policy. For the reasons discussed below, we believe that none of the grounds advanced warrant reversal of the ALJ's dismissal of Faith's application for failure to prosecute its application during the discovery phase of this proceeding, and that its request or distress sale relief for station KHOF-TV should be denied.

II. Designation Order and Bill of Particulars

23. Faith claims that the designation order and bill of particulars in this case do not comply with the notice requirements of §309(e) of the Communications Act.[20] Noting that the statute requires the Commission to notify the applicant for renewal "specifying with particularity the matters and things in issue," Faith alleges that the bill of particulars here is defective in two respects. First, Faith charges that the bill omits reference to materials favorable to Faith submitted by it to the Commission during the informal predesignation process. Because the bill of particulars does not discuss all information purportedly before the Commission, Faith alleges that the bill impermissibly broadens rather than narrows the issues, citing the designation Order in *Patrick Henry*, BC Docket No. 78-332.[21] As a related matter, Faith claims that defects in the bill of particulars were compounded during discovery because the ALJ restricted Faith's attempts to acquire from the Broadcast Bureau information underlying the allegations against Faith. Second, Faith maintains that the bill fails to state allegations sufficient to charge a violation of 18 U.S.C. §1343. According to Faith, the bill fails to state the nature of the alleged misrepresentations, that the purpose of the alleged scheme was to defraud, and the precise factual questions requiring resolution. Faith also claims that evidence submitted by Faith during discovery establishes that the charges against it are untrue.

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[20] "[The Commission] shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant . . . of such action and the ground and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally." §309(e) of the Communications Act of 1934 as amended, 47 U.S.C. §309(e) (1977).

[21] FCC 78-718, released November 3, 1978, 43 Fed. Reg. 52054 (November 8, 1978).

In particular, asserts Faith, depositions by Paul Diederich and Joseph Baumgartner, whose allegations form the basis of issue (c), retreated from these allegations during the course of deposition testimony and that other documentation further undercuts their original allegations. Faith also suggests that rather than designating Faith's license for hearing, the Commission should have referred the case to the Justice Department for possible criminal prosecution.

24. The Broadcast Bureau replies that the alleged defects in the bill of particulars are irrelevant to Faith's appeal of the dismissal of its renewal application and that there is no necessity for the bill to consider all predesignation materials. In any event, the Bureau submits, by failing to disclose pertinent information to the Commission, Faith also has raised a substantial question about its qualifications which the Commission is obligated to consider. The Bureau asserts that the bill of particulars alleges facts constituting a violation of the fraud statute with sufficient particularity.

25. Aside from the fact that it is unclear how Faith's arguments concerning the bill of particulars relate to the ALJ's dismissal of its application, we do not believe that Bureau's failure to discuss Faith's allegedly exculpatory materials in the bill of particulars deprives Faith of notice. A bill of particulars serves to inform the accused of the misconduct alleged so that the accused has an adequate opportunity to prepare a defense.[22] By informing Faith of the allegedly incriminating facts known to the Bureau, the bill of particulars has accomplished this function. Faith's arguments concerning the informally submitted material,

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[22] *See e.g., United States v. Sklaroff*, 323 F.Supp. 296 (S.D. Fla. 1971) and cases therein; *United States v. Mangiaracina*, 10 F.R.D. 415 (W.D. Mo. 1950) and cases cited therein; *Wetmore v. Goodwin Film and Camera Company*, 226 F. 352 (D.N.J. 1915); *KFPW Broadcasting Company*, 33 FCC 2d 311 (1972).

therefore, do not raise a question of notice — particularly since the information and documents to which it refers are within its possession[23] — but rather the question of whether the issues are overbroad and should be reconsidered. We consider this argument premature.[24] At hearing Faith would have the right to submit all relevant, competent and material evidence in its defense. The Commission would then decide the merits as to each issue. We believe the formal hearing would be the most desirable context for considering these matters.[25]

26. We find that the bill of particulars does state allegations with sufficient clarity. We do not believe the notice provisions of the Communications Act require the Commission to conform to the technical rules of pleading applicable to judicial proceedings.[26] Rather, the Commission

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[23]Faith has not submitted the materials which it argues should have been considered prior to designation to the Commission; as a result, they are not part of the record before us.

[24]*Cf. United States v. Calandra*, 414 U.S. 338 (1974) (an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on inadequate or incompetent evidence.) In general, the Commission does not entertain petitions for reconsideration of a designation Order. Section 1.106(a)(1) of the Commission's Rules. Where it appears there is no genuine issue of material fact for hearing, a party may move for summary decision. Section 1.251 of the Commission's Rules.

[25]We do not read *Hickman v. Taylor*, 329 U.S. 495 (1947) or *United States v. Proctor and Gamble Company*, 356 U.S. 677 (1958) as requiring prehearing procedures such as Faith suggests. Those cases mandate full development of the relevant facts in anticipation of the formal trial.

[26]*Philco Corporation (Philco) v. FCC*, 293 F. 2d 864 (D.C. Cir. 1961); *Deep South Broadcasting Company v. FCC*, 293 F. 2d 264 (D.C. Cir. 1960); *Allen C. Bigham, Jr.*, 5 FCC 2d 220 (1966). Faith correctly observes that the Commission had a more thorough discussion of the evidence in the designation order in *Patrick Henry, supra*. That case, which involved reconsideration of a grant of license renewal following remand from the Court of Appeals and other extraordinary features, presented circumstances which in our view merited the type of discussion we gave them. The Commission has discretion in fashioning its orders provided that basic rights are observed. *FCC v. WJR*, 337 U.S. 265 (1949).

need only state a fact situation which, if established at hearing, would tend to show that grant of a license would contravene the public interest, convenience, and necessity. We conclude that paragraph 5 of the bill of particulars meets this requirement and furthermore that the facts alleged, if proved, would constitute a scheme or artifice to defraud.

5. In August 1977 the Commission received allegations that beginning in 1976 Dr. Gene Scott, pastor-president of Faith Center, began broadcasting fund-raising appeals on Television Station KHOF-TV for church projects which never came about and for specific purposes that were promised and not carried through. The allegations concerning fund-raising for audio equipment, studio lights, roof repairs, and a fountain of faith. The Commission also received allegations that Dr. Scott was using some of the money raised through over-the-air appeals for his own personal use by giving it to other organizations in which he had an interest. The Commission also received allegations that fund-raising appeals by Dr. Scott were sometimes accompanied by statements that he had pledged money and that he received only $1.00 per year in compensation from the church when, in fact, he failed to pay the alleged pledge and the church provided him with a $185,000 house rent free and a hotel suite in Pasadena, California costing $2,000-$3,000 per month. Since the Commission has not been permitted to examine television Station KHOF-TV's financial documents and other information in order to determine the truth of these allegations, the Commission cannot determine whether fund-raising broadcasts on Station KHOF-TV violated or presently violate, Title 18, U.S.C., Section 1343.

27. The allegations in paragraph 5 charge Dr. Scott with falsely stating that (1) funds solicited would be used for specific projects, (2) Dr. Scott contributed his own funds to Faith, and (3) Dr. Scott received only $1 a year from Faith. If such false statements were in fact made with fraudulent intent and viewers were thereby induced to part with their money, a scheme to defraud would be shown. A scheme to defraud is a broad concept not limited to narrow types of misrepresentations but comprising any scheme reasonably calculated to deceive persons of ordinary prudence and comprehension and includes misrepresentations of existing fact and future promises.[27]

28. In support of its position that the allegation of wire fraud must be made with greater specificity, Faith relies principally on *Burkett v. United States*.[28] Burkett, a civil service employee was fired for making malicious statements about his supervisor — specifically, of reporting an alleged security violation concerning his supervisor. The court held that the notice of charges issued against Burkett did not provide adequate notice in five respects: (1) it did not detail the contents of the statements Burkett made, (2) it did not specify to whom the statements were made, (3) it did not specify why Burkett's statements were deemed malicious, (4) it did not specify the nature of the harm Burkett intended to inflict, and (5) it contained irrelevant and potentially misleading statements.

29. A comparison of *Burkett* with the facts before us indicate that *Burkett* does not signal any defect in the bill of particulars here. Initially we note that procedures in-

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[27]*See e.g., Durland v. United States*, 161 U.S. 306 (1969); *United States v. McNeive*, 536 F. 2d 1245 (8th Cir. 1976); *Burns v. Paddock*, 504 F. 2d 18 (7th Cir. 1974); *Gusow v. United States*, 347 F. 2d 755 (10th Cir. 1965).

[28]403 F.2d 1002 (Ct. Cl. 1968) (hereinafter *Burkett*).

volved in *Burkett* are significantly different from those used by the Commission. In *Burkett* the single notice of charges fulfilled several functions: a complaint, a bill of particulars and discovery. Commission procedures, by contrast, not only provide for separate discovery proceedings but also for procedures that afford additional protection against unfair surprise even after the commencement of the hearing.[29] Moreover, the notice of charges in *Burkett* had to comply with an Army regulation which specifically stated that a notice of charges could not be subsequently amplified and could not rely "upon the presumption, even though warranted, that the employee will readily understand the basis for the proposed action."[30] This provision significantly restricts the normal assumptions concerning the adequacy of notice.[31] In ruling that the description of the alleged malicious statements lacked specificity, the court not only relied on the restrictive Army regulation but also on the principle

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[29]Even after the conclusion of discovery, the presiding judge has the discretionary authority to fashion appropriate safeguards. *Brahy v. FRC*, 59 F. 2d 879 (D.C. Cir. 1932); *Chronicle Broadcasting Company*, 20 FCC 2d 33 (1969); *D & E Broadcasting, Inc.*, 1 FCC 2d 78, 80-1 (1965); *Belk Broadcasting Company of Florida, Inc.*, 27 FCC 2d 921 (Rev. Bd. 1971).

[30]402 F. 2d at 1004.

[31]Normally an agency need not follow the technical rules of pleading but need only apprise the accused of the nature of the allegations with sufficient particularity to allow the accused a reasonable opportunity to prepare a defense. *Morgan v. United States*, 304 U.S. 1 (1938). Consequently, the circumstances of each case, including the difficulty of ascertaining the facts necessary to formulate a defense and the opportunity to learn the pertinent facts outside of the government's formal charges assumes paramount importance. *Sunstrand Corporation v. Standard Kollsman Industries, Inc.*, 488 F. 2d 807 (7th Cir. 1973); *Money v. Anderson*, 208 F. 2d 34 (D.C. Cir. 1953). Generally, lack of notice will not be found where the accused has not been misled, surprised, or has not otherwise suffered detriment. *Intercontinental Industries, Inc. v. American Stock Exchange*, 452 F.2d 935 (5th Cir. 1971); *Cella v. United States*, 208 F. 2d 783 (7th Cir. 1953); *Hadigian v. Board of Governors, Federal Reserve System*, 463 F.Supp. 437 (D.D.C. 1978).

that Burkett was accused of defamation, which traditionally merits a highly precise description of the alleged defamatory statements. Wire fraud, on the other hand, as we have previously mentioned, is a broad offense. Moreover, unlike Burkett's alleged offense, which required a separate allegation of malicious intent, the necessary intent can be inferred from the nature of the facts comprising an alleged scheme of wire fraud.[32] Similarly, whereas the nature of the harm inflicted on Burkett's superior was speculative, the harm resulting from the alleged wire fraud here—the acquisition of money—is self evident. Finally, the bill of particulars here unlike Burkett's defective notice of charges, does not contain misleading, irrelevant matter.

30. Having discounted the applicability of *Burkett*, we turn to the truly fundamental consideration here. We see no danger that Faith will be prejudiced by any lack of specificity in the bill of particular. Faith has already learned the identity of the informants whose allegations form the basis for issue (c) and has had the opportunity to depose these individuals. If further clarification were necessary, Commission procedures discussed above would provide ample opportunity to prevent Faith from being surprised or misled.[33] Moreover, while arguing that the charges against it have not been stated with sufficient particularity, Faith inconsistently argues that it can readily rebut these charges. In any event, we expect that the financial records and videotapes available to Faith, in addition to what Faith has learned from deposing the Broadcast Bureau's informants and may learn from its employees, will apprise Faith of the necessary factual back-

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[32]*Gusow v. United States, supra.*

[33]*See* n. 29, *supra.*

ground.[34] Having discounted the possibility of prejudice to Faith we deem it irrelevant that Faith maintains its ability to demonstrate that the charges are groundless. This would be a question of fact for the hearing.

31. In particular we do not believe Faith has been prejudiced by the presiding judge's discovery Order FCC 80M-378, released March 6, 1980 which Faith alleges deprives it of the opportunity to amplify the bill of particulars. That Order declined to compel the Broadcast Bureau to answer 18 interrogatories served by Faith on November 26, 1979. In most respects we agree with the presiding judge that the interrogatories are improper. Several of the interrogatories are irrelevant. Interrogatory 8(a), for instance, asks when and how the Broadcast Bureau first learned videotapes were the property of Wescott. The Broadcast Bureau's investigative competence is not at issue here. For the same reason, Interrogatory 8(c) which asks what steps the Bureau took to secure the tapes directly from Wescott, interrogatory 12 which asks why the Bureau failed to attempt to secure the tapes directly from Westcott, interrogatory 17(b), which asks what efforts the Bureau made to determine whether its informants were biased, and interrogatory 18(a), which asks whether certain Commission personnel were shown copies of depositons, are irrelevant. Three other interrogatories are improper because they seek privileged information. Interrogatory 7(b) and (c) seeks the contents of statements obtained by the Bureau from its informants in anticipation of hearing. Interrogatory 18(b) seeks the contents of internal communications by Bureau investigators Rosenberg and Lyddane. To the extent interrogatory 18(b) seeks the views of Bureau investigators Rosenberg and Lyddane generally,

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[34]The instant case resembles *Cella v. United States, supra*, in which the nature of the alleged misconduct was clear but the government could not describe the precise occasions on which the misconduct occurred. As the defendant was not surprised or misled by the omission of these specifics no defect of notice was found.

we believe the Bureau has previously provided adequate information in its response to Faith's first interrogatories. We also believe the Bureau has adequately answered interrogatories 8(d) and 11 which inquire as to information concerning the contents of the videotapes sought by the Bureau. The Bureau has stated that it does not know the contents of the videotapes in question.

32. Most of the remaining interrogatories raise the question of the extent to which a licensee may seek the opinions of the Broadcast Bureau by interrogatory in order to clarify the issues. The Bureau's position seems in essence to be that all such inquiries are prohibited by Section 1.311(b)(4) of the Rules.[35] While the Bureau's position in this regard may be overdrawn, we need not reach this question. Even if the liberal discovery rules used in the federal courts were applicable here, the vast majority of Faith's interrogatories would still be improper.[36] Because discovery may not be used as a stratagem to maneuver an opponent into a disadvantageous position, interrogatories may not be used to require a party to furnish its opponent with a refutation of its own claims, particularly where that information is more readily available to the inquiring party.[37] Thus, interrogatory 5, asking for facts and information indicating that specific projects were carried out, interrogatory 7(b), asking for facts

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[35]Section 1.311(b)(4) states: "Commission personnel may be questioned generally by written interrogatories regarding the existence, description, nature, custody, condition and location of relevant documents and things and regarding the identity and location of persons having knowledge of relevant facts, and may otherwise only be examined regarding facts of the case as to which they have direct personal knowledge."

[36]The Commission's discovery procedures derive in part from the Federal Rules of Civil Procedure, *Discovery Procedures*, 11 FCC 2d 185, 186 (1968).

[37]*See United States v. Renault, Inc.*, 27 F.R.D. 23 (S.D.N.Y. 1960) *See also Aktiebolaget Vargos v. Clark*, 8 F.R.D. 635 (D.D.C. 1949).

and information indicating that Dr. Scott did not represent his remuneration to be $1.00 a year, interrogatory 13(b), asking for information provided by Faith favorable to Faith, interrogatory 14, asking for other information without limitation favorable to Faith, and interrogatory 17(a), asking for all information tending to show that Bureau informants are biased, are improper. Moreover, interrogatories become unjustified when they ask for an excessive amount of legal argumentation including characterization of the evidence.[38] On these grounds we reject Faith's interrogatories 4(a) and (b), which ask the Bureau to construe the wire fraud statute, interrogatories 10(a) and (b), which ask why the taking of certain depositions are essential to the determination of the issues, interrogatory 7(a), which asks whether Faith may rely on the issues being limited to certain factual questions,[39] interrogatory 8(b), which asks for all facts and information tending to show that Wescott may not freely dispose of its property, interrogatory 8(e), which asks for facts and information tending to show Faith is required to have custody of the videotapes, interrogatory 13(a), which asks for all facts and information provided by the licensee tending to be incriminatory, interrogatory 15, which asks for all facts

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[38]*See e.g., Harlem River Consumers Cooperative Inc. v. Associated Grocers of Harlem, Inc.*, 64 F.R.D. 459 (S.D.N.Y. 1974); *Reichert v. United States*, 51 F.R.D. 500 (N.D. Cal. 1970); *Zinsky v. New York Central Railroad Company*, 36 F.R.D. 680 (N.D. Ohio 1964); *United States v. Renault, Inc., supra*; *Payer, Hewitt & Co. v. Bellanca Corporation*, 26 F.R.D. 219 (D. Dela. 1960); *United States v. Maryland and Virginia Milk Producers Association*, 22 F.R.D. 300 (D.D.C. 1958).

[39]We do not believe the public interest would be served by restricting the evidence introduced at hearing to contentions previously advanced by the Bureau. The public interest is best served by the fullest possible development of the issues. As previously noted, however, the licensee is entitled to protection against undue surprise. *Cf. Pressley v. Boehlke*, 33 F.R.D. 316 (W.D.N.C. 1963); *McElroy v. United Airlines*, 21 F.R.D. 100 (W.D. Mo. 1957). (Applying an analogous rule in civil litigation).

and information tending to show Faith did not assert its objections to the investigation in good faith, and interrogatories 16(b), (c), and (d), which asks for all facts information tending to show that a licensee may rely on the "Blume letter"[40] and not cooperate with a Commission investigation involving a potential criminal violation. In addition, although they are not entirely clear, interrogatories 6(a) and (c) appear to seek a legal exposition on the definition of what constitutes a "designated project" for which funds were solicited and what constitutes Dr. Scott's "personal gain."

33. The Commission would be inclined to grant Faith's motion to compel with respect to interrogatories 1-3 and 6(b), provided these interrogatories were narrowly construed. We would also compel the Bureau to answer, in response to interrogatory 16(a), whether Faith employees were ever advised that pursuant to the "Blume letter" they need not cooperate with Commission investigators and that Faith would not be penalized for their failure to cooperate. The Bureau would also be compelled to answer interrogatories 9(a), (b) and (c), inquiring as to procedures followed in attempting to subpoena Faith's employees to obtain their deposition. While these are not relevant to any existing issue, they do appear to be relevant to the emerging question of whether Faith advised its employees to avoid service of the subpoena. In any event, however, in view of the fact that we will affirm the dismissal of Faith's renewal application, these questions are now moot. There is, of course, no point in the Bureau's now answering these interrogatories and no prejudice has accrued from its previous failure to answer. We considered these interrogatories in detail, how-

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[40]The "Blume letter" described procedures followed by Commission investigatory personnel. *See, infra*, para. 34 *et seq.*

ever, to satisfy ourselves that the Bureau's failure to answer them neither constituted a deprivation of due process to Faith nor provoked the obstructive behavior which prompted the dismissal of Faith's application.

III. The "Blume Letter"

34. Faith asserts that the Commission's designation of issues (a) and (b) is contrary to the so-called "Wiley Guidelines" or "Blume Letter", a letter dated March 20, 1975, from then Chairman Wiley to Jack P. Blume, then president of the Federal Communications Bar Association. According to Faith, Commission staff presented this letter to Faith at the time of investigation and, therefore, the Commission is bound by its terms. Faith cites language in the letter stating that the Commission does "not penalize a licensee for failure to cooperate in an investigation." Faith maintains that issues (a) and (b), which relate respectively to Faith's alleged refusal to allow Commission investigators access to its books and records and to submit materials requested in the Commission's June 15, 1978 by direction letter, are inconsistent with this representation.

35. The Broadcast Bureau replies that Faith's interpretation of the Blume letter is erroneous. In the Bureau's view the quoted language relied on by Faith relates only to the effect of noncooperation on determining the amount of any forfeiture assessed against a licensee. The Bureau rejects the claim that the Blume letter precludes the Commission from designating an issue against a licensee for failing to cooperate with a Commission investigation, contending that this interpretation of the letter would "literally preclude the Commission from carrying out regulatory responsibilities . . ." and permit the licensee to "terminate an investigation by stonewalling Commission investigators . . . ." Moreover, the Bureau notes that the designation of Faith's application for hearing was preceded by the Commission's June 15, 1978 by direction letter, which rejected Faith's

constitutional arguments and advised Faith that failure to submit the requested information would result in designation for hearing. Thus, argues the Bureau, Faith had notice that it could not rely on the Blume letter in this regard.

36. In our view Faith has misconstrued the effect of the Blume letter which, as was the case with Faith's notice argument, does not directly bear on the dismissal of Faith's application. As the Blume letter states on its face, it merely reports the results of an informal review by Former Chairman Wiley of procedures followed by Commission investigators. The letter is not a Commission rule or regulation, was not intended to have the force and effect of law and, therefore, cannot in any way bind the Commission.[41] The Commission's policies applicable to this proceeding were amply set forth in our letter to Faith of June 15, 1978. There we rejected Faith s objections to producing the requested information, concluded that Faith had no justification for withholding information from Commission investigators, and indicated that failure to comply could result in designation for hearing. We certainly did not recognize any "privilege" against cooperation with Commission investigators or right to demand a formal §403 investigation. In

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[41] *See Brennan v. Ace Hardware Corporation*, 495 F. 2d 368 (8th Cir. 1974); *Hawkins v. State Agriculture Stabilization an Conservation Committee*, 149 F.Supp. 681 (S.D. Tex. 1957). Moreover, even if Broadcast Bureau personnel had erroneously stated that Faith could rely on the Blume letter in withholding information, such representations would not foreclose our inquiry. The government is not estopped by the unauthorized representations of its agents. *See, e.g. Leimbach v. Califano*, 596 F. 2d 300 (8th Cir. 1976) *cert. denied*, 431 U.S 937 (1977); *Thanet Corporation v. United States*, 591 F. 2d 629 (Ct. Cl. 1979). On the other hand, any representations made by the Broadcast Bureau in conjunction with the Blume letter would be relevant to an evaluation of Faith's motives. But, as we previously stated, any reliance by Faith would be inconsistent with our June 15, 1978 by direction letter.

any event, whatever significance the Wiley letter might have had prior to the issuance of the June 15, 1978 letter, this was superseded by the June 15 letter.[42]

37. Moreover, Faith's attempted Construction of the Blume letter is clearly unreasonable. Unresponsiveness to Commission inquiries may reflect lack of candor or misrepresentation indicating that a licensee is unfit.[43] For this reason, any purported policy barring inquiry into failure to cooperate with Commission investigators or other Commission inquiries would be incompatible with our obligations under the Communications Act. The Act requires us to make a finding that the public interest, convenience, and necessity would be served thereby before granting any renewal application.[44] Where such a finding cannot be made the application must be designated for hearing.[45] It would be inconsistent with these responsibilities to close our eyes to the possibility that a licensee's noncooperation with Commission investigators stemmed from character deficiencies

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[42]As Faith notes, the Commission did say in the June 15 letter: "The Commission recognizes that [Faith's] objections are advanced in good faith and in the licensee's sincere belief in their validity." As described below, however, subsequent events have proven that statement overly generous.

[43]*See, e.g., FCC v. WOKO, Inc.*, 329 U.S. 223 (1946); *Wadeco, Inc. v. FCC*, Case No. 78-1913 (D.C. Cir. April 1980); *Las Vegas Valley Broadcasting Company v. FCC*, 589 F. 2d 594 (D.C. Cir. 1978); *Janus Broadcasting Company*, 47 RR 2d 805 (1980); *Vinita Broadcasting Company, Inc.*, 30 FCC 2d 458 (1971); *Nick J. Chaconas*, 28 FCC 2d 231 (1971); *Radio Broadcasters, Inc.*, 23 FCC 2d 209 (1970).

[44]Communications Act of 1934 as amended §§307-9, 47 U.S.C. §§307-9 (1977).

[45]*Id.*

undercutting the licensee's basic qualifications.[46] Certainly, the Blume letter cannot be interpreted to have this effect.

38. In any event, a close reading of paragraph 5 of the Blume letter does not support Faith's interpretation. The paragraph begins: "The cooperation of a station with an investigation is not a factor in determining the amount of a forfeiture." The question of how the amount of forfeiture is determined is unrelated to that of whether noncooperation with a Commission investigation evidences lack of candor reflecting adversely on a licensee's basic qualifications. A subsequent phrase relied on by Faith — "Although we do not penalize a licensee for failure to cooperate in an investigation" — must be construed in the context of the overall subject of the paragraph, forfeitures. Moreover, the paragraph goes on to say: ". . . we expect [a licensee] to cooperate and to be candid and open with our investigators, and we intend to issue Orders for formal 403 inquiries in those cases where a licensee's obstruction of an informal investigation makes it impossible to ascertain the facts." This language belies any possibility that obstructive behavior would not have further consequences for the licensee.

IV. Constitutional Arguments

39. Faith asserts that the solicitation of funds encompassed by issue (c) is protected by the First Amendment and that the government bears the burden of demonstrating a

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[46]That the Commission should not adopt procedures that foreclose full inquiry into public interest factors was enunciated in *Retail Store Employees Union, Local 880, Retail Clerks International Association, AFL-CIO v. FCC*, 436 F. 2d 248 (D.C. Cir. 1970). An alleged privilege against cooperation with Commission investigators would also be inconsistent with the Commission's grant of full power to conduct investigations. *See FCC v. Schreiber*, 201 F.Supp. 421 (S.D. Cal. 1962) *modified and aff'd* 329 F. 2d 517 (9th Cir. 1964) *modified* 381 U.S. 279 (1965); *Stahlman v. FCC*, 126 F.2d 124 (D.C. Cir. 1942). *See also* Communications Act of 1934 as amended §403, 47 U.S.C. §403 (1977); Section 73.1225(a) of the Rules.

compelling state interest achievable by no less intrusive means before Faith is required to divulge any information concerning these practices. Inquiry into Faith's fundraising practices would, in Faith's view, violate the free exercise clause of the First Amendment. Faith characterizes its fundraising activities as embodying a "credal belief that giving is an act of sacrifice and worship."[47] Faith considers its pastor, Dr. Scott, as God's chosen representative, to have the power to determine the application of any funds donated. Were the Commission to question the use of these funds, argues Faith, it would be unconstitutionally testing the truth or falsity of religious belief and substituting the judgment of the agency in place of the ecclesiastical hierarchy. In particular, Faith objects to any inquiry into the expense records of Faith's pastor, because the church-minister relationship is especially privileged. Faith also contends that inquiry into Faith's financial affairs violates the establishment clause of the First Amendment. Faith argues that such inquiry would create excessive entanglement of the government into church affairs.

40. In maintaining that the Commission may not require disclosure of Faith's financial affairs without demonstrating the existence of a compelling state interest achievable by no less intrusive means, Faith faults the presiding judge for not ruling on all constitutional claims prior to discovery. For this proposition, Faith relies principally on *Surinach v. Pesquera de Busquets*.[48] Faith finds the Bureau's second interrogatories, because they are broader in scope than the first interrogatories, particularly objectionable. Faith sug-

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[47]Faith elaborates on the nature of its religious beliefs in a document titled "The Theology of Giving" contained in its February 1, 1979 response to the Broadcast Bureau's interrogatories.

[48]604 F. 2d 73 (1st Cir. 1979) (hereinafter *Surinach*).

gests that criminal prosecution or a show cause proceeding represent less intrusive alternatives to the course of action followed here.

41. The Broadcast Bureau responds that Faith misstates established principles of law. According to the Bureau, Faith may not shield itself from Commission scrutiny by merging its broadcast and religious activities. Rather, argues the Bureau, Faith takes its broadcast license burdened with public interest obligations justifying Commission inquiry. Moreover, the Bureau denies that a person may, under the cloak of religion, commit frauds on the public with impunity.

42. The Commission does not accept Faith's constitutional arguments. We recognize of course that religious solicitations are protected by the First Amendment. But we strongly disagree with Faith as to the nature and extent of that protection. By attempting to characterize its fundraising activities as expressions of belief and worship, Faith disregards an axiomatic distinction in First Amendment law between freedom to believe and freedom to act.[49] While freedom to believe is absolute, conduct is subject to government regulation, although an indirect burden on religious belief may result.[50] Thus, solicitation, as a form of conduct, may be subject to government regulation of numerous types including regulation designed to prevent fraud on the public.[51] As Faith correctly points out, the First Amendment imposes definite limitations on the form such regulation may take. For example, a statement of religious belief may not be characterized as a fraudulent misrepresentation —

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[49]*Cantwell v. Connecticut*, 310 U.S. 296, 303-4 (1940).

[50]*Sherbert v. Verner*, 374 U.S. 398 (1963); *Braunfeld v. Braun*, 366 U.S. 599 (1961).

[51]*Cantwell v. Connecticut, supra. See also Prince v. Massachusetts*, 321 U.S. 158 (1944).

only statements of secular fact may be so characterized.[52] In the present case, the alleged misrepresentations indeed represent statements of fact *i.e.*, the use to which solicited funds would be put, Dr. Scott's compensation, and whether Dr. Scott pledged his own funds. To the extent Faith disputes the nature of the statements actually made, Faith raises factual questions more appropriately resolved at an evidentiary hearing. The mere possibility that Faith may have a defense to the allegations does not justify obstructing the trial of these issues. Another limitation Faith correctly points out, is that regulations designed to prevent fraud may be no broader than necessary. For this reason, courts have frequently struck down licensing schemes in which the state has attempted to impose blanket prohibitions on public solicitation subject to the unrestrained discretion of public officials, or has attempted to impose overly restrictive financial constraints on solicitors.[53] Faith accurately observes that the courts have preferred that the state undertake to prosecute specific acts of fraud rather than resort to the types of licensing schemes found unconstitutional. We believe the Commission has complied with these principles. We have not imposed any prior restraint on Faith's becoming a Commission licensee; nor have we instituted indiscriminate pro-

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[52]*United States v. Ballard*, 322 U.S. 78 (1944). *Compare* 322 U.S. at 86-8 and 322 U.S. at 83-4. *Accord Church of Scientology of California v. Richardson*, 437 F. 2d 214 (9th Cir. 1971); *Founding Church of Scientology v. United States*, 409 F. 2d 1146 (D.C. Cir. 1969). *SEC v. World Radio Mission, Inc.*, 544 F. 2d 535 (1st Cir. 1976). Similarly, a church may establish property interests by ecclesiastical law. *Jones v. Wolf*, 443 U.S. 595 (1979).

[53]*Village of Schaumburg v. Citizens for a Better Environment*, 100 S.Ct. 826 (1980); *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Jamison v. Texas*, 318 U.S. 413 (1943); *Cantwell v. Connecticut, supra*; *Lovell v. Griffin*, 303 U.S. 444 (1938); *Fernandes v. Limmer*, 465 F.Supp. 493 (N.D. Tex. 1979); *International Society for Krishna Consciousness v. Engelhardt*, 425 F.Supp. 176 (W.D. Mo. 1977).

spective examination of Faith's affairs. Rather, we have acted only in response to allegations of specific fraudulent acts, which we must examine in order to make a determination whether to renew Faith's license. As for Faith's proposed less restrictive alternatives, we see no reason to have referred this matter to the Justice Department prior to taking action on our own when the Commission has concurrent jurisdiction in this area.[54] To do so would prolong these renewal proceedings indefinitely. Nor has Faith shown why a show cause proceeding would be a desirable alternative.

43. Faith's excessive entanglement argument similarly misses the mark. The Commission does not intend any continuing entanglement in Faith's affairs.[55] As stated above, we have the narrow purpose of investigating an allegation of specific fraudulent conduct. Because our inquiry relates to a narrow and legitimate governmental interest, it is readily distinguishable from that found offensive in *Surinach*.[56] That case dealt with an order by the Puerto Rican Department of Consumer Affairs directed to Catholic Church related schools requiring them to produce extensive financial information concerning their operations. This Order was issued pursuant to the Department's mandate to restrain inflationary trends and to establish and monitor price controls on goods and services. In the court's view, the preliminary information gathering by the Department could not be severed from the Department's logical goal, the institution of cost ceilings for Catholic Schools. As the court

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[54]See *FCC v. American Broadcasting Company*, 347 U.S. 284 (1954).

[55]*Compare NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979); *Lemon v. Kurtzman*, 403 U.S. 602 (1979) (Where government would have had continuous supervisory presence over conduct of religious schools).

[56]The presiding judge similarly distinguished *Surinach* in FCC 79M-1086, released September 17, 1979.

concluded that such ceilings would seriously interfere with the Catholic school's ability to carry out their religious mission and would entangle the state in decision making more appropriately left to the church, activities of the Department constituted a clear and present threat to the schools' First Amendment rights. Moreover, inflationary trends could have been investigated without specific inquiry into parochial schools. Our consideration of alleged fraudulent activities by a specific church-licensee bearing on that licensee's qualifications in no way resembles the government actions found objectionable in *Surinach*.[57] Furthermore, the Commission is not proposing to entangle itself into the delicate relationship between a church and its pastor.[58] Our concern with Dr. Scott's compensation and contributions arises because Dr. Scott allegedly misrepresented these over the air.

44. We also reject Faith's suggestion that its fundraising is a matter between Faith and its congregation. By conducting its fundraising by means of television, Faith has elected to occupy a forum that is not only distinctly public in character, but one of a limited number of such public forums. Faith thereby subjects itself to public interest obligations.

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[57]*Surinach* itself expressly distinguished the facts before it from a case "in which the records of a religious organization are subpoened pursuant to a criminal investigation, a situation in which the states' interest unquestionably is strong." 604 F. 2d at 80. *See also In re Rabbinical Seminary*, 450 F.Supp. 1078 (E.D.N.Y. 1978) (where the court approved the disclosure of large amounts of financial information pursuant to a grand jury investigation of a religious institution allegedly obtaining federal aid to education funds fraudulently). The type of entanglement found objectionable in *Surinach* closely resembles that disapproved in *Lemon v. Kurtzman, supra*.

[58]Compare *McClure v. Salvation Army*, 460 F. 2d 553 (5th Cir 1972) (employment discrimination law not applicable to Church-minister relationship).

> A religious group, like any other, may buy and operate a licensed radio or television station. [citation omitted]. But, like any other group, a religious sect takes its franchise 'burdened by enforceable public obligations.' *Office of Communications of United Church of Christ v. FCC*, 359 F. 2d 994, 1003 (1966). There are, concededly, constitutional limits on the conditions which the FCC may impose. But the Constitution does not obligate the FCC to relinquish its regulatory mandate so that religious sects may merge their licensed franchises completely into their ecclesiastical structures.[59]

Thus, the exercise of Faith's First Amendment rights must be delicately balanced against possible injury to the public. Faith might have been able to show that its conduct on the merits, while open to question from a purely secular point of view — if indeed open to question at all — was nevertheless protected by the First Amendment.[60] As we have said, Faith would have had the opportunity to assert at the hearing that its representations, because of their relationship to Faith's religious creed, should not be considered fraudulent. However, we reiterate that the possible existence of a defense would not bar hearing the merits of the case. Indeed, such a position would raise serious constitutional problems in itself. Faith's view would tend to create a favored class of licensees immune from Commission scrutiny although questions justifying inquiry into other licensees

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[59] *King's Garden, Inc. v. FCC*, 498 F. 2d 51, 60 (D.C. Cir. 1970) *cert. denied*, 419 U.S. 996 (1974). *See generally FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Red Lion Broadcasting Company v. FCC*, 395 U.S. 367 (1969). *Cf. SEC v. World Radio Mission, Inc., supra, Muhammed Temple of Islam v. City of Shreveport, Louisiana*, 387 F.Supp. 1129 (W.D.L.A. 1974), *aff'd*, 517 F. 2d 922 (5th Cir. 1975).

[60] *Cf. Anti-Defamation League of B'nai B'rith, Pacific Southwest Regional Office v. FCC*, 403 F. 2d 169 (D.C. Cir. 1968) *cert. denied*, 394 U.S. 930 (1969) (anti-semitic remarks protected).

existed. Membership in this preferred class would rest on a prior evaluation of the licensee's asserted religious creed, here "The Theology of Giving." By contrast, evenhanded inquiry into allegations of misconduct by both religious and secular licensees places the government in a less objectionable posture.[61]

45. As we have concluded that Faith's general constitutional claims are groundless, we are left with the possibility that specific discovery requests are prohibited. We agree with the presiding judges below that Faith has not demonstrated that specific discovery requests are either irrelevant to the Commission's legitimate inquiry or that they would subject Faith to specific, demonstrated harm.[62] Therefore we conclude that Faith was without justification in refusing to respond to those discovery requests and Orders discussed in the next section.[63] Absent justification, we do not consider the mere assertion of Faith's constitutional claims to immunize Faith from the consequences of failing to comply with valid Commission procedures during discovery.[64]

V. Faith's Discovery Performance

46. The presiding judge based his dismissal of Faith's renewal application on the conclusion that Faith failed to respond to Broadcast Bureau discovery requests in good

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[61]*Cf. Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970).

[62]*See in re Rabbinical Seminary, supra. See generally, Buckley v. Valeo*, 424 U.S. 1 (1976); *NAACP v. Alabama*, 357 U.S. 449 (1958).

[63]One particular point deserves special mention. Although individual membership records of a political or religious organization may under some circumstances, be protected from disclosure by the First Amendment, this principle cannot automatically be extended to an organization's officials and solicitors. *NAACP v. Alabama, supra*. Thus, we have sought disclosur of Dr. Scott's contribution records for the relevance to the fraud issue.

[64]*Cf. Barenblatt v. United States*, 360 U.S. 109 (1959) (contempt of congress ruling upheld over claim of freedom of association violation).

faith and thereby deliberately obstructed the proceedings. Reviewing Faith's overall discovery performance, the presiding judge held that Faith's failure to comply strictly with the December 4 discovery Order led to this result. At issue are the first two rounds of discovery initiated by the Broadcast Bureau. These consist of (1) 16 interrogatories and 5 classes of document requests served December 8, 1978 and (2) 39 interrogatories and 20 classes of documents requests served October 1, 1979. The presiding judge interpreted Faith's responses to these discovery requests as a studied effort to avoid producing documents and information harmful to its case. He accused Faith of failing to make prompt, specific, and reasonably detailed responses and of answering only in an incomplete and piecemeal fashion after securing extensions from the presiding judges. The ALJ found that these Orders remain, in large measure, unmet. Under the circumstances, and in light of Faith's perceived bad faith, the ALJ concluded that Faith had failed to prosecute its application within the meaning of the Commission's rules.[65]

47. The pertinent procedural history is as follows.[66] Faith initially responded to the Bureau's first round of discovery on February 1, 1979. Faith's incomplete response prompted the Bureau to file a motion to compel on March 2, 1979. Faith opposed the Bureau's motion, in main part,

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[65]The Broadcast Bureau served its third interrogatories comprising 17 interrogatories and the third motion for production of document comprising 5 classes of documents on November 27, 1979. On December 10, Faith objected in whole or part to 12 interrogatories and answered 5. By Order FCC 80M-96, released January 17, 1980, Judge Luton upheld Faith's objection to 7 interrogatories and ordered Faith to answer 5 others. Faith provided further answers to the five interrogatories on February 1, 1980. The ALJ did not make Faith's performance with respect to the third interrogatories a factor in dismissing its application and for that reason, absent any indication that Faith's performance mitigates its previous misconduct, we need not reach that question.

[66]*See also* para. 7 *et seq.*, *supra*.

on the grounds that the bill of particulars was defective since it did not allege a specific violation of 18 USC §1343, that the motion was an impermissible fishing expedition and that the motion violated Faith's First Amendment right of freedom of religion. The ALJ ordered Faith to make further response to interrogatories 6 and 8-16 by April 13 and to produce the requested documents at a mutually convenient time.[67] Generally, the ALJ ordered Faith to respond with information regarding how money donated was dedicated or expended for projects for which it was solicited and donated, specific information about funds spent for Dr. Scott's personal use, and noted that Faith had refused to answer interrogatories on constitutional bases which had been rejected at the prehearing conference.

48. Faith sought leave to appeal to the Commission on April 20, 1979 and filed a notice of appeal with the D.C. Circuit on May 9, 1979.

49. In its appeal to the Court of Appeals, Faith argued that in the absence of a proper charge, the Bureau's discovery requests constitute an unreasonable search and seizure in violation of the Fourth Amendment and that the Bureau's requests violate the First Amendment rights of the church and will result in an unwarranted entanglement by the Commission in church activities and affairs. The presiding judge denied Faith's request for appeal to the Commission and ordered Faith to respond to discovery.[68] On June 14 Faith moved for a stay pending Faith's judicial appeal. The ALJ denied the stay motion and ordered discovery by July 18. On July 11, Faith moved for a stay

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[67]N. 11, *supra*.
[68]N. 12, *supra*.

before the Court of Appeals. The court denied the stay and summarily dismissed the appeal on July 13, 1979.[69]

50. Within a week of the court's decision, on July 18, 1979, Faith submitted its further responses to the Broadcast Bureau's first discovery request. The ALJ, however, remained dissatisfied with Faith's responses to interrogatories 6, 10, and 13-16 those interrogatories inquiring into how funds solicited for particular causes were expended, funds turned over to Wescott, and Dr. Scott's pledges and contributions, and also noted that Faith had still failed to produce most documents requested, primarily videotapes of the "Festival of Faith" program. Setting a hearing date of October 30, 1979, the Presiding Judge ordered further responses by August 17.[70]

51. Of the responses submitted on August 17, the ALJ remained dissatisfied with the responses to interrogatories 13-16, which inquired into Dr. Scott's pledges and contributions. Moreover, videotapes requested in one of the document requests were not submitted.[71]

52. The Broadcast Bureau served its second round of discovery on October 1, 1979. Faith responded on October 24 with a pleading that did not specifically answer a single interrogatory or produce any documents. Faith was then faced with the ALJ's Order (1) directing further responses by December 18 (2) and further document production and (3) threatening dismissal.[72] The ALJ noted that Faith had not answered a single interrogatory contained in the Bureau's second request, and that its objections consisted largely of generalized complaints which did not assist ma-

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[69]N. 13, *supra*.
[70]N. 14, *supra*.
[71]*See* n. 15, *supra*.
[72]N. 18, *supra*.

terially resolution of the matters under consideration. Faith appealed to the Commission on December 13 and on the same date moved for a stay, which was denied.[73]

53. The presiding judge devotes the bulk of his dismissal order to the perceived deficiencies in Faith's December 18 responses and Faith's failure to produce the vast majority of the requested documents. He concluded that Faith's responses to interrogatories 8, 9, 11, 21-26, 32, 35, and 38 were inadequate. These interrogatories sought information about projects for which funds were solicited, donations received for specified purposes, documents in the possession of Wescott relating to Faith's finances, the existence and location of "Festival of Faith" tapes, information in possession of Wescott relating to the "Festival of Faith" program, how Wescott expended Faith monies and the basis for Faith's assertion that Wescott was concerned about government entanglement when asked to provide information. Additionally, he found that Faith's responses to interrogatories 3, 4, 8, 10-12, 15, 34, and 36 were made in bad faith. These interrogatories inquired into the identity of Faith personnel who reviewed Faith's financial records, the identity of programs during which solicitations were made, the identity of projects for which solicitations were made, whether Faith segregated broadcast solicitations from other funds, documents in the possession of Wescott relating to the finances of Faith, the identity and duties of the officers and directors of Faith, Dr. Scott's business and personal expenses, monies he received, and Dr. Scott's contribution records.

54. Faith contends that it has rendered substantial compliance during the discovery phase of these proceedings. Preliminary, Faith faults the presiding judge for suggesting

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[73]FCC 79-875, released December 28, 1979.

impropriety in Faith's judicial appeal of the first discovery Orders and requests for extension of time. Faith claims it has good cause for pursuing a judicial appeal, for seeking extensions of time, and for a stay *pendente lite*. Moreover, Faith asserts it has furnished virtually all of the information requested and was justified in withholding any information not disclosed.

55. Similarly, Faith objects to the ALJ's treatment of Faith's responses to the second round of discovery requests. Faith considers the requests for numerous financial records unduly burdensome. It also complains that the ALJ overlooked the fact that much of the information requested by the second round of interrogatories and document requests was not in Faith's possession but rather in the possession of its sister church, Wescott. Although the two churches share some common officers, Faith considers it a misapplication of agency law to attribute knowledge gained by the common officers, notably Dr. Scott, as agents of Wescott, to Faith. Additionally, Faith accuses the ALJ of derogating its *bona fide* constitutional claims regarding its religious doctrines. Faith submits that it has substantially complied with the second round of discovery.

56. The Broadcast Bureau essentially concurs with the ALJ's analysis of Faith's performance.

57. Having examined the record in this case, it is our considered view that Faith's consistent refusals to respond during the discovery phase of this proceeding so obstructed the orderly conduct of these proceedings that Faith has failed to prosecute its application. We further find that Faith's performance during the discovery phase of these proceedings displays bad faith. Of critical significance in reaching this conclusion is Faith's continued failure to respond subsequent to the Court of Appeal's summary dismissal of its appeal on constitutional grounds on July 13, 1979. At this

point Faith's continuing noncompliance with successive Orders to comply went beyond pursuing its legitimate and appropriate remedies and became an abuse of process warranting dismissal of its application. As a final matter, as will be explained below, we do not agree with Faith that the ALJ erred in any material way in compelling responses to the Bureau's discovery requests. Therefore, we affirm the dismissal with prejudice of Faith's application.

58. Faith's initial response to the Broadcast Bureau's first set of interrogatories gave satisfactory answers to only six of the 16 interrogatories propounded. Faith objected on constitutional grounds to four interrogatories inquiring about pledges allegedly made by Dr. Scott (No. 13-16) and to interrogatories asking what funds were transferred by Faith to Wescott (No. 10) and to Sunset Mausoleum (No. 12). Faith also attempted to justify unresponsive answers to interrogatories asking whether funds solicited were expended for Dr. Scott's personal use (No. 8), the debts and obligations existing between Faith and Wescott (No. 9), and what interest Faith had in Sunset Mausoleum (No. 11).[74]

59. The Court of Appeals on July 13, 1979 summarily dismissed Faith's attempt to vindicate these claims judicially. At this point, in our view, Faith was clearly put on notice that its constitutional claims furnished no basis for refusing to comply with the ALJ's determination as to the propriety of discovery requests if indeed they were not already put on notice by our June 15, 1978 by direction letter. Nevertheless, five days after the issuance of the court's decision, Faith filed another inadequate response to the in-

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[74]In response to interrogatory 6, Faith was dilatory in supplying an adequate statement of disbursements relating to specific projects. A statement satisfactory to the ALJ was not supplied until Faith's third response to the interrogatory on August 17, 1979.

terrogatories. Faith failed to provide the information requested about the four interrogatories concerning Dr. Scott's pledges (No. 13-16).[75] Moreover, Faith did not disclose the amount of funds raised which were turned over to Wescott to be "handled on Faith's behalf" (No. 10) or provide a satisfactory statement of disbursements made for specific projects (No. 6).

60. With regard to the four questions concerning Dr. Scott's personal pledges (Nos. 13-16), the Commission fully agrees that the responses Faith gave on August 17, 1979 are especially egregious. They are patently evasive, and are the third in a series of unresponsive answers to the same interrogatories. Faith initially answers the interrogatory "State what representations were made by Dr. Scott in each instance of a solicitation as to the pledge of his own funds" with the apparently straightforward statement" "*No* 'representations were made by Dr. Scott in each instance of a solicitation to a pledge of his own funds'." Faith, however, goes on to make an offer of "expanded answers to what it thinks the interrogatories might really intend to seek as information." What the interrogatories sought as information was what they clearly stated, and Faith has no bona fide reason to attempt a distinction. Faith then takes the completely unwarranted position that the Commission's June 15, 1978 by direction letter, in which the Commission stated it would not require at that time the disclosure of all individual donor records, exempted Dr. Scott's donor records from disclosure. The distinction between Dr. Scott's records and the records of rank and file contributors has always been clear, and Faith has no basis for its contrived interpretation. Faith then begins its "expanded answer,"

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[75]Instead Faith proffered an affidavit stating that Dr. Scott had paid all pledges.

with the statement: "To the best of its knowledge, Faith can recall no instance of a solicitation in which representations were made by Dr. Scott as to a pledge of his own funds. However, at the same time solicitations were being made, along with many other respondees Dr. Scott was known to have made pledges." The "expanded answer" continues with the same kind of ambiguity and equivocation in which Faith denies that any representations were made while simultaneously describing and discussing what are apparently pertinent representations. The net effect of Faith's answer is obfuscation and a demonstration of its bad faith.

61. Through this sequence of events Faith also failed to supply an important class of documents, the master videotapes of the "Festival of Faith" program, which Faith complained were in Wescott's possession. As will be explained, we consider its rationale for this failure groundless.

62. The Commission similarly concurs in the presiding judge's criticism of Faith's responses to the second set of interrogatories. Even if some of the points in Faith's initial response to the Bureau's second set of interrogatories were valid, we can see no justification for Faith's failing to answer a single one of the 39 interrogatories and 20 document requests. While there may be some merit to Faith's complaints that it would be difficult to supply all information requested in the alloted time period, Faith need not have resorted to a blanket objection. At the very least, Faith could have specifically indicated in those instances where specific responses were not immediately feasible, and what information would require further time to compile.

63. Finally, we disagree with Faith's argument that inquiry into Faith's fundraising beyond the specific incidents mentioned in the bill of particulars is irrelevant. Even assuming, *arguendo*, that some reason exists for giving the

specific instances mentioned in the bill of particulars primary importance,[76] it would nevertheless be relevant to Faith's qualification to remain a Commission licensee to know whether the originally alleged instances of fraud were part of a pattern of conduct.

64. When Faith finally gave specific responses to the Bureau's second interrogatories, these responses, in our view, displayed serious deficiencies and bad faith. Most notable is Faith's withholding of information concerning Wescott and Dr. Scott, ostensibly on the grounds that Dr. Scott's knowledge of these matters was obtained in capacities other than as an officer of Faith. Faith bases this argument on a principle of agency law purportedly enunciated in *Ruberoid Company v. Roy*[77] to the effect that knowledge acquired by an agent while acting other than on behalf of his principal is not imputed to the principal. Faith also alleges that Dr. Scott's interests are adverse to Faith. Faith contends its interpretation is buttressed by the ALJ's ruling striking Dr. Scott as a named respondent to the second interrogatories. In Faith's opinion, the severance of Dr. Scott indicates that Dr. Scott should not be required to divulge any knowledge not acquired as Faith's agent.

65. We agree with the ALJ that this line of reasoning is a bad faith contrivance. The interrogatories were properly addressed to the corporate licensee. Although interrogatories

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[76]As indicated previously, (No. 29, *supra*) Commission procedures provide safeguards to protect the licensee from unfair surprise if new allegations are introduced.

[77]240 F.Supp. 7 (E.D. La. 1965) (hereinafter *Ruberoid*). In *Ruberoid*, employees of Ruberoid Company defrauded a second corporation. The court held that the injured corporation could not proceed against Ruberoid Company because the employees were acting in their own interest and against the interests of Ruberoid Company. The employees' adverse interest was envinced by the fact that their fraud resulted in Ruberoid Company's loss of a contract with the defrauded corporation.

could not have been directly addressed to Dr. Scott, who is a non-party,[78] this does not mean Faith could arbitrarily withhold information available to Dr. Scott, its principal. A party must disclose all information not otherwise privileged within its control or available to it.[79] A party may not unreasonably ignore information available to it from outside sources or fail to make good faith attempts to obtain such information.[80] Assuming that the principles of imputed knowledge are relevant to this question, we disagree with Faith's application of pertinent agency law. Faith argues that (1) Dr. Scott acquired the information outside the scope of his agency as president of Faith and (2) as an officer of Wescott, Dr. Scott has interest adverse to Faith *i.e.*, that of avoiding government entanglement. We find Faith's line of reasoning utterly unpersuasive. Under general principles of agency law the fact that an agent has acquired information outside the scope of his agency is irrelevant if he subsequently acts for his principal with the benefit of such information.[81] Faith does not dispute that Dr. Scott had actual

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[78]Section 1.323 of the Rules provides that interrogatories may only be addressed to parties.

[79]*See e.g., Schwimmer v. United States*, 232 F. 2d 855 (8th Cir. 1956); *Erone Corporation v. Skouras Theatres Corporation*, 22 F.R.D. 494 (S.D.N.Y. 1958); *Republic of Italy v. De Angelis*, 14 F.R.D. 519 (S.D.N.Y. 1953).

[80]*See e.g., Pilling v. General Motors Corporation*, 45 F.R.D. 366 (D. Utah 1968); *Holland American Merchants Corporation v. Rogers*, 23 F.R.D. 267 (S.D.N.Y. 1959), *Societe International pour Participation Industrielles et Commerciales, SA v. Clark*, 9 F.R.D. 263 (D.D.C. 1949).

[81]*See Mechanics Universal Joint Company v. Culhane*, 80 F. 2d 147 (7th Cir. 1935) *aff'd* 299 U.S. 51 (1936); *In re Kentucky Wagon Manufacturing Company*, 71 F. 2d 892 (6th Cir. 1932); *Pollman v. Curtice*, 255 F. 628 (8th Cir. 1919); *Claris v. Oregon Short Line Railroad Company*, 51 P.2d 217 (Idaho 1935); *John H. Giles Dyeing Machinery Company v. Klauder-Weldon Dyeing Machinery Company*, 135 N.E. 854 (N.Y. 1922); *Henry v. Omaha Packing Company*, 115 N.W. 772 (Neb. 1908).

control over the documents sought in discovery while he served as president of Faith. Faith's own answers to the Bureau's interrogatories indicate that Dr. Scott routinely inspected the requested financial records possessed by Wescott[82] and Dr. Scott himself appears to concede he exercised physical control over at least some of the videotapes in question.[83] Nor does the Commission perceive an adverse relationship between Dr. Scott and Faith. Dr. Scott serves as president of both Faith and Wescott with the concurrence of both organizations. Faith has advanced no evidence that Dr. Scott's dual agency involves deception against either corporation or a conflict of interest. Indeed, Dr. Scott remains Faith's principal spokesman. Thus, both corporations must have been aware that Dr. Scott would deal with information of relevant to both corporations and would be subject to the legal obligations and fiduciary duties appropriate in both capacities. Therefore, it does not avail Faith now to complain that this arrangement proves troublesome to the parties who voluntarily created it.[84]

66. We also reject the argument advanced by Faith concerning the burden imposed by disclosure of the requested financial records. Faith, in submitting no more than highly generalized descriptions of these financial records, relies on *United States for the Use and Benefit of Schneider, Inc. v. Rust Engineering Company*[85] for the proposition that a re-

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[82]*Further Response of Faith Center, Inc. to Interrogatories*, filed July 18, 1979 at 14-5; *Response to the Broadcast Bureau's Second Interrogatories*, filed December 18, 1979 at 20.

[83]Appendix O to *Reply*, filed July 21, 1980, by Faith at 5.

[84]*Cf. Farr v. Neuman*, 199 N.E.2d 369 (N.Y. 1964).

[85]72 F.R.D. 195 (W.D. Pa. 1976). There the defendant had provided the plaintiff with 318,000 pages of financial records, which defendant had indexed. What the court rejected was the plaintiff's request that each of the 318,000 pages be numbered for identification with respect to references in accompanying interrogatories. The court found it more reasonable, in light of the burden on the defendant and the absence of any objection to the sufficiency of specific responses to the interrogatories, for the plaintiff to perform the numbering itself during the course of examining the documents.

sponse to a broadly framed interrogatory need only reflect the broadness of the interrogatory. However valid that proposition may be generally Faith's responses here are unjustifiably unresponsive. Similarly Faith relies on *In re U.S. Financial Securities Litigation*[86] for the proposition that unduly burdensome interrogatories should be stricken. Again, however, the facts simply do not bring this case within the sweep of that rule.

67. We find the ALJ wholly justified in condemning Faith's specific responses to the Bureau's second interrogatories. Several interrogatories call for Faith to identify specific financial records on which its responses are based. However, Faith fails to identify any relevant documents in its response to these interrogatories although the Bureau's interrogatories clearly state that in all instances the date, author, location, and similar information should be furnished for all documents. Examination of Faith's responses to the individual interrogatories reveal them to be wholly inadequate. For example, in response to Interrogatory 3 which inquired into what financial records are consulted by Faith's bookkeepers and accountants, Faith responded: "every bill, record, journal, ledger, individual contribution record, payroll record, account receivable record, contribution receipt to donors, church government report, checking accounts and receipts." In response to Interrogatory 8 which inquired into financial records concerning recent fundraising projects, Faith responded: "Information presented by auditor for Wescott Christian Center, Faith does not

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[86] 74 F.R.D. 497 (C.D. Cal. 1975). In that multi-party proceeding, one of the parties had commenced discovery by serving nearly 3,000 interrogatories, covering nearly 400 pages. Responses by even one party would have cost approximately $24,000. If the other parties had proceeded in kind, the discovery proceedings would clearly have been delayed interminably.

know what documents he consulted." In response to Interrogatory 9 which inquired into documents indicating funds used for specific projects, Faith responded: "Wescott Christian Center cash receipt and disbursement records . . ." In response to Interrogatory 10 which inquired into records indicating the segregation of broadcast funds from other funds, Faith responded: "The audited statements by the independent outside C.P.A. and the C.P.A.'s work papers . . ." In response to Interrogatory 11 which inquired into records in the possession of Wescott, Faith responded: "Faith does not know all of the documents . . ." In response to Interrogatory 32 which inquired into records in the possession of Wescott, Faith responded: "Faith does not know all the documents . . ." and "Faith does not know the identity of 'each financial record referred to . . .' " In response to Interrogatory 34 which inquired into records of Dr. Scott's contributions, Faith responded: "Church disbursement records and work papers of Gary Crane, C.P.A." In response to Interrogatory 36 which inquired into records of Dr. Scott's contributions, Faith responded: "Faith promise pledges and contribution receipt forms in Dr. W. Eugene Scott's possession." In each case Faith either professed ignorance or referred to general classes of records without specifically identifying any.

68. Several of the responses also reflect Faith's contrived interpretation of agency law and claim ignorance of matters concerning Dr. Scott and Wescott. These include: documents in Wescott's possession (Nos. 8, 9, 11, and 32),[87] the officers and directors of Wescott (No. 12),[88] in-

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[87] *See* preceding paragraph.

[88] In effect, Dr. Scott swore that he did not know that he himself was the president of Wescott. In its February 1, 1979 response to the Broadcast Bureau's first interrogatories, Faith told the Commission that Faith and Wescott had the same officers, board of directors, and congregation, and Dr. Scott was the pastor of both churches. By the time of Faith's August 17, 1979 responses, however, Faith reported that Wescott's board of directors had been "reconstituted."

formation concerning videotapes in Wescott's possession (No. 21, 26),[89] Wescott personnel (interrogatory 35), and Dr. Scott's contribution records (No. 36.).[90] In addition, Faith caused needless confusion by responding to interrogatory 4: "Provide the identity of the broadcast programs during which solicitations for money are/were made by Faith officers, directors, and employees' . . ." with the comment ". . . Faith's answer only includes those programs produced and presented by "Faith officers, directors, and employees acting in their capacity as 'Faith officers, directors, and employees'."

69. Additionally, Faith was unresponsive to interrogatory 15, which asks Faith to describe the duties and responsibilities of Wescott directors, officers, and employees which related to the operation of KHOF-TV or monies solicited. Faith replied simply by listing names and titles.

70. Viewing Faith's discovery performance in light of all of the circumstances, we conclude that Faith's renewal application should be dismissed. During these proceedings, Faith has consistently acted in a manner that not only displays bad faith but has seriously impaired the Commission's ability to make an accurate determination of the matters in issue. Faith has consistently proffered essentially the same objections about specificity, constitutional principles, and the alleged separation between Faith and Wescott. While Faith's constitutional claims were not finally put to rest until the Court of Appeals summarily dismissed its appeal on

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[89]As previously indicated, Faith had already failed to comply with the ALJ's Order to produce these tapes. Dr. Scott concedes that some of these tapes were kept in an employee's apartment at Scott's direction. *See* para. 84 *et seq., infra.*

[90]Continuing the pattern of its responses to the first interrogatories, Faith does not provide specific information regarding Dr. Scott's contributions although Faith concedes Dr. Scott has the pertinent records in his possession.

these grounds, after that time Faith's continued unresponsiveness on those grounds to both rounds of discovery at issue is totally without justification. Faith's unresponsiveness prior to judicial dismissal of its appeal might not have warranted dismissal of its application. However, after that ruling Faith's continuing noncompliance with successive Orders to comply went beyond pursuing its legitimate and appropriate remedies and became an abuse of process clearly warranting dismissal of its application. Similarly, its other grounds for noncompliance with discovery Orders, grounds which do not rise to the level of constitutional privilege, were properly rejected by the ALJ, and we perceive no basis for concluding that Faith's continued unresponsiveness on these grounds was justified.

71. Faith's unresponsiveness has seriously compromised the public's right to know whether a television broadcast station is being operated in the public interest. Even where Faith has revealed information, it has required extraordinary effort on the part of the Commission to acquire it. Much information still sought remains withheld. Moreover, as will be seen, although Faith was aware from the very beginning of these proceeding of the availability of the Commission's distress sale policy, Faith elected to exercise that option only after a year or tortuous and futile proceedings.

72. In the Commission's view, Faith's pattern of behavior in these proceedings constitutes a grave abuse of the Commission's processes. Judicial and quasi-judicial forums have the inherent power to protect the integrity of their processes and the public from this type of abuse by dis-

missing the offender's case.[91] We have made this the policy of the Commission.[92] Faith's assertion of alleged First Amendment rights does not, in itself, make this sanction any less appropriate. We determined that reliance on these asserted rights to avoid discovery to be baseless and had so informed Faith prior to discovery.[93] Therefore, we shall dismiss Faith's application with prejudice.

VI. Broadcast Bureau Conduct

73. Faith lists seven examples of what Faith describes as conduct by the Broadcast Bureau designed to deprive Faith of due process. These are: (1) The Bureau's field investigation violated the "Wiley Guidelines" and the Bureau's October 31, 1977 letter incorrectly summarized the results of the investigation; (2) The Bureau refused to disclose the substance of its informants' statements and delayed the taking of their depositions until a time inconvenient to Faith; (3) the Bureau failed to call or depose a witness, Joe Shackelford, who allegedly would corroborate allegations against Faith; (4) The Bureau failed to make a statement by its informants available to Faith; (5) The Bureau failed to complete the exchange of exhibits; (6) the Bureau opposed issuance of a subpoena *duces tecum* to Wescott and (7) the

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[91]*National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976); *Link v. Wabash Railroad Company*, 370 U.S. 626 (1962); *Montgomery v. CIR*, 367 F. 2d 917 (9th Cir. 1966). *Compare Societe International v. Rogers*, 357 U.S. 197 (1958) (Dismissal not justified where inability to comply with discovery requests due to circumstances beyond party's control).

[92]*Vue-Metrics, Inc.*, 69 FCC 2d 1049 (1978) *aff'd*, 615 F. 2d 1369 (D.C. Cir. 1980) (discussed *infra* at para. 80).

[93]*See Lyons v. Johnson*, 415 F. 2d 540 (9th Cir. 1978) (5th amendment). *Cf. Barenblatt v. United States*, 360 U.S. 109 (1959) (contempt of congress conviction upheld over claimed infringement of right to free association). *Compare Campbell v. Gerrans*, 592 F. 2d 1054 (9th Cir. 1979) (4 of 34 interrogatories were unanswered but were questionable and presented clear 5th amendment problems; however, failure to answer could be basis for adverse inference at trial).

Bureau has opposed deposition of its own personnel. The Bureau has not responded to these allegations.

74. We find no substance in any of Faith's allegations, and in any event, we do not see how the Broadcast Bureau's alleged misconduct justifies in the least Faith's own improper behavior. With respect to Faith's individual allegations, we make the following findings as to the allegations listed in the preceding paragraph: (1) We have already rejected Faith's complaints concerning the September 1977 field investigation insofar as they are reflected on the record before us in our June 15, 1978 by direction letter and in the instant Order. If Faith wished to develop additional evidence concerning the investigation it would have had the opportunity to do so at the hearing. (2) Faith has received a bill of particulars and has had the opportunity to depose the Bureau's informants; no prejudice to Faith is evident.[94] (3) If Faith wished to have Shackelford deposed or to call him as a witness, it was free to take the initiative to do so. (4) The Commission's rules do not require making the informants' statement available until after the informant testifies.[95] (5) We see no malfeasance by the Bureau in the materials cited by Faith. The Bureau states that it has provided Faith those exhibits available to it and that it would provide additional exhibits when and if they became available.[96] (6) The Commission agrees with the ALJ that in view of the relationship between Faith, Westcott, and Dr. Scott, the requested subpoenas to Wescott are frivolous.[97] (7) The

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[94]*See also* Broadcast Bureau's Response to Interrogatories Propounded by Faith Center, Inc., filed February 1, 1979.

[95]Section 1.362 of the Rules. The Broadcast Bureau claims it released a copy of informant Baumgartner's statement to Baumgartner for transmission to Faith.

[96]Broadcast Bureau letters of November 7, 1979, and March 14, 1980.

[97]*See* FCC 79M-1001, released August 28, 1979.

Commission's rules do not provide for the routine deposition of Commission employees.[98] Faith's desire to observe these employees' demeanor does not justify waiver of the usual rule.

VII. Distress Sale

75. Faith claims that dismissal of its renewal application contravenes the Commission's distress sale policy[99] and urges that its distress sale request be granted. Faith asserts that on January 10, 1979, Faith timely informed the Commission of its intent to explore the possibility of a distress sale, but that it elected to continue with discovery in the interim as a demonstration of good faith and to pursue its constitutional claims. Faith explains, however, that it never elected to forego a distress sale and that in view of other procedural delays, there was no urgency in making a distress sale election. When, on October 30, 1979, Faith notified the ALJ its intention to seek a minority purchaser, the ALJ, in Faith's view, was not justified in rejecting Faith's election. Faith interprets Commission policy as permitting a licensee to elect a distress sale at any time prior to or even shortly following the commencement of the hearing. Accordingly, the ALJ may not usurp the Commission's power to act on the distress sale proposal. Faith submits that it was forced to elect a distress sale at the time because it could not prepare for trial as a result of the burdensome discovery process. Faith asserts that the presiding judge should have

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[98]Section 1.311(b)(2) of the Rules.

[99]*See Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 FCC 2d 979 (1978) and *Clarification of Distress Sale Policy*, 44 RR 2d 479 (1978). The policy permits, subject to the limitations discussed below, a licensee designated for a renewal or revocation proceeding to assign the license to a minority purchaser at a price at or less than 75% of full market value. *Lee Broadcasting Corporation*, 76 FCC 2d 462 (1980).

taken into account that approving the distress sale proposal could have promoted minority participation in broadcasting in a major market and avoided a protracted hearing. Even yet, claims Faith, a distress sale could avoid further proceedings including appellate litigation. Faith denies that it sought a distress sale in bad faith.[100]

76. The Broadcast Bureau responds that Faith has abused the Commission's distress sale policy and should not be rewarded for doing so. The Bureau observes that Faith had apparently contemplated a distress sale as early as November 1978,[101] and had no justification for failing expeditiously to decide one way or another and to inform the Commission of its intentions in this regard. The Bureau submits that Faith already had begun negotiations with TELACU prior to notifying the ALJ that it intended to seek such a buyer. Instead, claims the Bureau, Faith subjected the Commission to pointless discovery proceedings every bit as draining on Commission resources as many hearings the distress sale policy was designed to obviate. According to the Bureau, Faith has attempted to evade Commission scrutiny for as long as possible and has elected to pursue a distress sale only when the hearing or dismissal became imminent. Commission policy, argues the Bureau, does not countenance "playing roulette" with the Commission's processes in this manner. The Bureau claims that in the proceedings cited by Faith, the licensee had promptly elected a distress sale and that Faith's original petition for special relief was both incomplete and violative of Commission's rules.

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[100]TELACU's appeal raises essentially the same points as Faith's.

[101]In a telegram to the Commission dated November 21, 1978, Faith had asked the Commission for a 30 day extension of time in which to advise the Commission whether it intended to elect a distress sale.

77. The Commission rejects Faith's contentions at least as they relate to KHOF-TV. First, we believe that Faith was intentionally dilatory in electing a distress sale. Second, we do not believe that distress sale policy should be used to permit an applicant to avoid the consequences of bad faith obstruction of Commission proceedings. Third, not only would a distress sale here fail to conserve resources by avoiding a hearing but Faith has already wasted substantial resources expended in the pointless discovery proceedings.

78. Contrary to Faith's assertions, we do not think Faith had any justification for not making a prompt decision whether to pursue a distress sale after raising the possibility in its January 10, 1979 letter. Faith was well aware that a prompt decision would be desirable. At the prehearing conference on January 19, 1979, Judge Head expressed his concern that deferring the decision whether to seek a distress sale might result in onerous and unnecessary discovery proceedings, and noted that in a recent case he had continued discovery for a period of five months to permit the licensee to seek a minority purchaser.[102] Observing that the Commission's policy was unclear on the relationship between discovery and distress sales, Judge Head solicited the parties' views. Broadcast Bureau counsel urged that discovery continue — consistent with its position on the prior case — on the grounds that Faith would not go forward with a distress sale until it had learned its chances of losing its license during discovery. Faith's counsel, however, apparently disagreed, and suggested that "we are, in a position, I think in a sense, to make an evaluation with or without discovery of whether we want to go forward with the

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[102]*See* Tr. 75-80. Judge Head referred to *Street Broadcasting Corporation*, 44 RR 2d 1630 (ALJ 1979).

case."[103] Faith's counsel further suggested that if the presiding judge felt it would be conducive to the efficient dispatch of the schedule, Faith's counsel wished to discuss with Faith the possibility of coming in with a motion for a continuance. The ALJ then stated that he had no opinion one way or another at that point whether discovery should be continued.[104] The ALJ set a date of May 29, 1979 as the date requests for continuances had to be submitted and admonished Faith's counsel that if an attempt were made to effectuate a distress sale in May or June he would take into account the time already expended.[105]

79. In light of the fact that the presiding judge specifically called Faith's attention to the undesirability of onerous and unnecessary discovery proceedings, we believe it is inexcusable for Faith to have waited nine full months to move for special relief — and then only to seek a continuance of another 180 days to negotiate a distress sale. Clearly, Faith could have foreseen that protracted prehearing proceedings would result when Faith filed an initial response to the Broadcast Bureau's first interrogatories which objected in whole or in part to fully half of the interrogatories posed and, thereafter, pursued judicial review of the resulting discovery Orders. Nor do we think Faith had justification for failing to act promptly following the dismissal of its judicial appeal on July 13, 1979. When Faith did finally elect to pursue a distress sale on October 30, it made no attempt to explain its failure to seek a continuance earlier but instead offered the bland assertion that it relied on Commission policy that a distress sale could be

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[103]Tr. 78-9.

[104]In its January 10 letter, Faith indicated that it would make its distress sale election by February 27. *See* n. 9, *supra*.

[105]Tr. 86.

elected prior to or shortly following the commencement of hearing. We can only conclude that Faith totally ignored the legitimate concerns voiced by the ALJ and recognized by Faith's counsel. In formulating the distress sale policy we did not intend to undercut the authority of the ALJ to regulate the course of the hearing.[106] The ALJ bears the important responsibility of insuring that administrative proceedings, including discovery, are expeditiously and fairly conducted. Consequently, the ALJ has broad discretion to control the course of the proceedings.[107] To permit a party to ignore the ALJ's valid Orders and frustrate with impunity the ALJ's attempts to bring about an orderly hearing of the issues would undercut the ALJ's authority and contravene the public interest.[108] Therefore, we will not permit the distress sale policy to be used to this effect. A distress sale, contrary to the views of Faith and TELACU is a form of extraordinary relief and depends on the facts and circumstances of the individual petition. Although distress sales are generally granted, they are not a matter of right. We have stated from the outset that "All such transactions will be scrutinized closely to avoid abuses"[109] and that "licensees generally cannot be permitted, far less encouraged, to knowingly play roulette with Commission licensing processes."[110] These statements elaborate upon those in the *Policy Statement* and *Clarification* suggesting that distress sale relief will be available until the initiation of the hearing.

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[106]Administrative Procedure Act §556(c), 5 U.S.C. §556(c) (1977); Section 1.243 of the Rules.

[107]*See Discovery Procedures*, 11 FCC 2d 185, 187 (1968); *Tinker, Inc.*, 4 FCC 2d 372 (1966); *Chronicle Broadcasting Company*, 20 FCC 2d 728 (Rev. Bd. 1969); *WSTE-TV, Inc.*, 13 FCC 2d 848 (Rev. Bd. 1968).

[108]*Vue-Metrics, Inc., supra* at 1058.

[109]68 FCC 2d at 983.

[110]44 RR 2d at 481.

Thus, it would be unreasonable for Faith to rely on the availability of a distress sale to allow itself to abuse our processes and defy the ALJ. While we would not impose any rigid timetable for electing a distress sale, we would expect a licensee to proceed expeditiously in assessing its position and announcing its intent.

80. However, what we have here is not simply a dilatory election of a distress sale. Here, approval of a distress sale would serve to shield Faith from the consequences of bad faith obstruction of the Commission's processes. We do not think this should be permitted. The Commission faced a similar situation in *Vue-Metrics, Inc.*[111] There an applicant was dilatory in responding to discovery regarding the financial ability of its principals. After extended delay had occurred in producing the desired information, the applicant attempted to moot the issue by amending its application with a new financial showing. Although the Commission recognized that permitting the amendment would have the desirable effect of preserving a comparative choice, the Commission concluded that the injury to the integrity of the administrative process that would occur if the Commission ignored the applicant's misconduct outweighed this benefit, and the Commission dismissed the application.

81. We addressed a somewhat similar question in *Bartell Broadcasting of Florida, Inc.*[112] and *Stereo Broadcasters, Inc.*[113] *There, the Commission denied distress sale requests in two "transition cases" — i.e.*, cases in hearing at the time the distress sale policy was first announced — in which an initial decision had already issued at the time

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[111]N. 92, *supra*.

[112]45 RR 2d 1329 (1979).

[113]74 FCC 2d 543 (1979), *appeal pending* Case No. 79-2412 (D.C. Cir.).

of the distress sale request. The Commission reasoned that a distress sale at that point would be undesirable (1) because the opportunity to conserve hearing resources had been lost and (2) once an administrative decision had issued, the public interest and the integrity of the administrative process would not be served by granting a distress sale. We think similar reasoning applies here. The record discloses ample grounds for terminating these proceedings for Faith's failure to prosecute its application. Given this determination, we do not believe the public interest or the integrity of the administrative process would be served by ignoring this conclusion.

82. Faith argues that it is entitled to distress sale relief if it files such a petition at any time prior to the commencement of the hearing. This argument ignores the fact that Faith's failure to respond to valid discovery Orders over an extended period of time was a major reason for extensive delays in the commencement of the evidentiary hearing. The ALJ's granted continuances for the express purpose of giving Faith additional time to respond to discovery requests. They also warned the licensee to make its election to seek distress sale relief early in the proceedings, a recommendation which, if followed, would have prevented an unnecessary waste of Commission resources. Faith did not file its petitions until February 29, 1980 — almost exactly one year from the February 27, 1979 date proposed in Faith's letter, and seven months after the Bureau filed its motion to dismiss for failure to prosecute. And even when it did file, the petition was incomplete — it failed to include two appraisals as required by *Northland Television Inc.*,[114] the controlling precedent at that time. Hence, we reject the proposition that a licensee is entitled to extraordinary relief

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[114] 72 FCC 2d 51 (1979).

merely because it makes its election prior to the start of the hearing. The ALJ has the discretion to consider the request in light of the entire course of the proceedings. Of course a complete petition, filed early in the proceedings, carries a presumption of validity.

83. Our disposition of Faith's appeal necessarily results in partial denial of Faith's petition for special relief. That petition proposes the sale not only of KHOF-TV, San Bernardino, the station immediately at issue, but also co-owned stations KVOF-TV, San Francisco, California, and WHCT-TV, Hartford, Connecticut. The Commission will consider this matter in a separate Order and at that time determine the effect of this proceeding on the respective assignments.[115]

VIII. *Broadcast Bureau's Newly Discovered Evidence*

84. The Broadcast Bureau proffers newly obtained affidavits, which the Bureau claims discloses additional abuse of process and misrepresentation by Faith. These affidavits were executed by former Faith employees Susanna C. Decin and David Footitt.[116] Both affidavits relate to tapes and documents which Faith claimed were unavailable for discovery because they were in the possession of Faith's sister church Wescott. According to the affidavits, however, the tapes

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[115]Petitions to deny have been filed against the Hartford assignment, on June 13, 1980, by The Department of Communications of the Capitol Region Conference of Churches, the Communications Management Team of the Christian Conference of Connecticut, and eight named petitioners and against the San Francisco assignment on June 30, 1980, by Together Medic Ministries and the Inter-Faith Communications Commission. The Broadcast Bureau requested in a pleading, filed July 10, 1980 to be permitted to file comments following disposition of Faith's appeal here. The Bureau will have that opportunity in the forthcoming proceedings.

[116]Susanna C. Decin is now Mrs. David Footitt. For clarity's sake, however, we will continue to refer to her as Decin.

and documents were in fact deliberately concealed at the behest of Faith's president, Dr. Scott.

85. Footitt recites that he was employed by Faith from 1976 through 1979 and served as Dr. Scott's "right-hand man." He relates that Dr. Scott pursuant to the so-called "wild geese" plan rented several trucks, which were used to transport potentially incriminating tapes and documents to be secreted in a Phoenix, Arizona warehouse. Footitt appends copies of truck and warehouse receipts to his affidavit. Footitt states that other material was transported to northern California, and several tapes were hidden in Footitt's apartment in October 1979. Appended to Footitt's affidavit is an alleged receipt from Faith's attorney Edward Masry for the concealed tapes. Footitt also states that when the Broadcast Bureau attempted to depose Faith employees in October 1979, Dr. Scott advised the employees to avoid service by United States marshals. Dr. Scott, Footitt, and Decin allegedly went into hiding in Dr. Scott's Lake Almanor house. Footitt also accuses Dr. Scott of initiating lawsuits to harass potential opponents and discourage investigation.

86. Decin corroborates Footitt's affidavit with respect to the "wild geese" plan, and the avoidance of service by United States marshals. In addition, Decin describes an allegedly fraudulent letter submitted by Faith to the Commission as part of Faith's August 17, 1979 responses to the Broadcast Bureau's first interrogatories. The letter, appended as an exhibit to Decin's affidavit, appears on its face to be from Wescott to Faith. The letter apparently informs Faith that Wescott will not turn over tapes and documents in its possession to Faith because of concerns over Faith's financial performance and government entanglement, and because to do so would be unduly burdensome. The letter chides the Commission for not requesting the

tapes and documents directly from Wescott. The letter is signed by Decin as Secretary of Wescott and dated August 13, 1979. Decin now states that the letter is a fabrication prepared by Dr. Scott, who coerced Decin — never an officer of Wescott — into signing it. Decin claims the use of Wescott was a sham designed to frustrate the Commission. Decin further claims that Faith had been negotiating for the distress sale of its stations long before it first elected such a sale in October 1979. As confirmation, Decin attaches what she describes as a draft letter agreement tendered by Inter-American Broadcasting, Inc. (a subsidiary of TELACU) dated May 10, 1979, and signed by David C. Lizarraga. In view of this draft agreement, the Broadcast Bureau argues that Faith was deliberately dilatory in electing a distress sale.

87. In response, Faith tenders affidavits by Dr. Scott, attorney Michael Goch, and eleven Faith employees. Dr. Scott states that Wescott is not a sham but rather a church formed prior to Dr. Scott's association with Faith. According to Dr. Scott, Wescott insisted on retaining ownership of Dr. Scott's tapes from the inception of Dr. Scott's association with Faith. Contrary to Decin's allegations, Dr. Scott maintains that the letter from Wescott to Faith was the result of a legitimate meeting of Wescott's Board and that Decin was in fact a bona fide corporate officer of Wescott. As to Footitt's allegations, Dr. Scott apparently concedes that documents and tapes were removed from the state of California and that he placed videotapes — which Dr. Scott characterizes as exculpatory — in Footitt's custody. Scott explains this as fulfilling his commitment to preserve this material from government encroachment, a threat which he foresaw based on California state government actions against other religious groups. Scott also concedes that he, Footitt, and Decin went to his parent's home in Lake Al-

manor, but denies this was to avoid service.[117] Scott further explains that he filed lawsuits against Commission employees and informants for the purpose of establishing Faith's constitutional rights and not for the purpose of harassment. Faith also claims that Footitt and Decin were fired for embezzlement and later attempted to blackmail Faith.[118] Faith points out that Decin and Footitt have given depositions exonerating Dr. Scott and inconsistent with their present affidavits.[119] Faith states that it was informed by the Broadcast Bureau that a distress sale election could be made at least up to the commencement of the hearing.

88. More generally, Faith objects to the consideration of the Broadcast Bureau's affidavits at all. Faith argues that it is improper for an appellate body to consider material not presented to the judicial officer making the decision being appealed from.[120]

89. While the Commission believes that the contradictions between the material submitted by the Broadcast Bureau and by Faith raises a substantial question of fact, we are not able to resolve these questions without further hearings.[121] Moreover, as we have dismissed Faith's application

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[117]The eleven employees state they did not attempt to avoid service. As Faith reports, however, the Bureau was unable to serve 14 of its 15 prospective deponents. *Response to Broadcast Bureau's Second Interrogatories and Opposition to Second Motion for Production of Documents*, filed October 24, 1979.

[118]Footitt and Decin claim that Dr. Scott fired Footitt and Decin quit because Dr. Scott disapproved of their marriage. They further state that Dr. Scott has initiated a harassing lawsuit against them.

[119]Footitt and Decin maintain these depositions were given under duress.

[120]*Citing United States v. Gray*, 611 F. 2d 194 (7th Cir. 1979); *Rosen v. Lawson-Hemphill, Inc.*, 549 F. 2d 205 (1st Cir. 1976); *Commonwealth of Massachusetts v. United States Veteran Administration*, 541 F. 2d 119 (1st Cir. 1976)

[121]Faith does admit, however, that Dr. Scott ordered tapes of his broadcasts placed in Footitt's apartment. While the question of Dr. Scott's intent is disputed, we think we may take official notice of Dr. Scott's control of the tapes and documents. *See* para. 87, *supra*.

irrespective of the proffered new material it is not necessary for us to reach these questions.[122]

90. ACCORDINGLY, IT IS ORDERED, That the Request for oral argument, filed July 25, 1980, by Faith Center, Inc. IS DENIED.

91. IT IS FURTHER ORDERED, That the appeal of FCC 79M-1466, released December 13, 1979, by Faith Center, Inc. IS DENIED and FCC 79M-1466 IS AFFIRMED.

92. IT IS FURTHER ORDERED, That the motion for leave to intervene, filed May 7, 1980, by TELACU IS GRANTED.

93. IT IS FURTHER ORDERED, That, the appeals of FCC 80M-459, released March 17, 1980, filed May 7, 1980, by Faith Center, Inc. and TELACU, ARE DENIED; FCC 80M-459 IS AFFIRMED; the application for renewal of

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[122]Several collateral matters remain to be disposed of. (1) As TELACU has demonstrated an interest in these proceedings and its participation will be helpful, TELACU's petition to intervene, filed May 7, 1980, will be granted. *See Max M. Leon, Inc.*, 73 FCC 2d 796 (1978); (2) As we do not feel oral argument will be helpful in this instance, the request for oral argument, filed July 25, 1980, by Faith will be denied; (3) On February 13, 1980, Inspiration Media, of Southern California, Inc. moved to consolidate this proceeding with that involving station KHOF(FM), a comparative proceeding in which IMSC is a competing applicant. This dismissal of this proceeding having rendered the matter moot, the motion will be dismissed; (4) Good cause having been shown, late filed affidavits, filed July 22, 1980, by Faith will be accepted; (5) A reply filed July 21, 1980 by TELACU will be accepted. The Broadcast Bureau's opposition implicitly addressed both Faith's and TELACU's appeals. (6) A letter pleading dated July 22, 1980, written by the Reverend W. Eugene Scott will be stricken as an unauthorized reply. (7) A motion for leave to intervene filed by the Faith Center Department of Development Trust Fund on September 19, 1980 will be denied. In view of the fact the Trust Fund is represented by Dr. Scott who is already participating in this proceeding as president of Faith, and there is no indication that the Trust Fund's position differs in any way from Faith's, we do not see how the Trust Fund's participation would assist the Commission. *See WLCY-TV, Inc.*, 46 CCC 2d 860 (Rev. Bd. 1974); Section 1.223(c) of the Rules.

license for station KHOF-TV, San Bernardino, California, filed August 1, 1977, by Faith Center, Inc. IS DISMISSED WITH PREJUDICE, and this proceeding IS TERMINATED.

94. IT IS FURTHER ORDERED, That Faith Center, Inc. IS AUTHORIZED to continue to operate KHOF-TV until 12:01 a.m. December 28, 1980, PROVIDED, HOWEVER, that if licensee seeks reconsideration or judicial review of our Memorandum Opinion and Order, it is authorized to continue to operate the station until thirty (30) days after the forum which has jurisdiction to review this proceeding issues its mandate.

95. IT IS FURTHER ORDERED, That the Petition for Special Relief, filed February 29, 1980, by Faith Center, Inc. IS DENIED IN PART consistent with the opinion rendered herein.

96. IT IS FURTHER ORDERED, That the motion for consolidation, filed February 13, 1980, by Inspiration Media of Southern California, Inc,. IS DISMISSED as moot.

97. IT IS FURTHER ORDERED, That good cause having been shown, the request for leave to file late filed affidavits, filed July 22, 1980, by Faith Center, Inc., IS GRANTED.

98. IT IS FURTHER ORDERED, That the motion to dismiss filed July 31, 1980, by the Broadcast Bureau, to strike the reply, filed July 21, 1980 by TELACU, IS DENIED.

99. IT IS FURTHER ORDERED, That the opposition, filed August 8, 1980, by the Broadcast Bureau, to strike the motion to dismiss, to recuse or to remand, filed by the Reverend W. Eugene Scott IS GRANTED, and the subject pleading IS STRICKEN.

100. IT IS FURTHER ORDERED, That the motion for leave to intervene, filed September 19, 1980, by Faith Center Department of Development Trust Fund IS DENIED.

101. IT IS FURTHER ORDERED, That the request for leave to file unauthorized pleading, filed August 22, 1980, by the Broadcast Bureau IS GRANTED to the extent consistent with the foregoing opinion and otherwise IS DENIED and the Broadcast Bureau's Comments on Reply, filed August 22, 1980 IS ACCEPTED for filing to the extent consistent with the foregoing opinion.

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO, *Secretary*.

APPENDIX E.

Order Extending Time to File Petition for Writ of Certiorari.

Supreme Court of the United States.

Faith Center, Inc., Petitioner, v. Federal Communications Commission. No. A-209.

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 19, 1982.

/s/ Warren E. Burger
Chief Justice of the United States.

Dated this 27th

APPENDIX F.

1. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

United States Constitution, Amendment I.

2. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Amendment V.

APPENDIX G.

Motion to Dismiss.

In the United States Court of Appeals for the District of Columbia Circuit.

Faith Center, Inc., Appellant, v. Federal Communications Commission, Appellee. No. 79-1478.

Faith Center, Inc., licensee of KHOF-TV, San Bernardino, California is engaged in an apparent attempt to resist an FCC investigation into allegations made against it in connection with its license renewal application. It purports to appeal three interlocutory rulings of an FCC administrative law judge which were issued at pre-hearing conferences. The hearing has not yet commenced and the Commission has not had the opportunity to consider any exception to the judge's findings which may be filed when the hearing is completed. This case should be dismissed because the Court lacks jurisdiction to hear the appeal.

The Commission instituted an informal investigation into the licensee's operation after it received a number of complaints including allegations that Faith Center solicited funds over the air which were not used for the purposes described in the broadcasts. As the Broadcast Bureau later set out in a bill of particulars, it was alleged that Dr. Gene Scott, a licensee official, solicited funds for studio equipment, roof repairs and the construction of a foundation but that the money received was not used for those projects. It was also alleged that Dr. Scott was using some of the money raised through the over-the-air appeals for his own personal use by giving it to other organizations in which he had an interest. In addition, it was alleged that fund raising appeals by Dr. Scott were sometimes accompanied by statements that he had pledged money and that he received only $1.00 a year compensation from the church, when, in fact, he

failed to pay the alleged pledge and the church provided him with a $185,000 house rent free and a hotel suite in Pasadena, California costing $2,000-$3,000 per month. [Bill of Particulars, Attachment 1.]

When the informal investigation was unsuccessful in resolving the public interest concerns of the Commission with respect to the operation of the station, the renewal license application was designated for a formal hearing. The designation order sought to determine whether renewal of the license was warranted, and/or whether an Order of Forfeiture should issue for possible violations of the Radio Fraud Statute, 18 U.S.C. §1343. [Order and Notice of Apparent Liability, Attachment 2.]

In a pre-hearing conference the Administrative Law Judge (ALJ) denied Faith Center's request to strike out references in the designation order and bill of particulars to possible violations of the rádio fraud statute. [*Order Following Second Prehearing Conference*, Appendix C of Notice of Appeal.] Faith Center had argued that the fraud allegations should be as specific as a criminal indictment. [Motion to Delete Issue (C), Attachment 3.] The ALJ ruled that general allegations were sufficient in the non-criminal administrative proceeding particularly in light of Faith Center's unwillingness to provide additional information. [Hearing Transcript, Vol. 2, p. 60, Attachment 4.]

In the second and third orders, the ALJ denied Faith Center's attempt to foreclose discovery of licensee records and personnel. [*Order Following Third Prehearing Conference*, Appendix B of Notice of Appeal; *Memorandum Opinion and Order*, Appendix A of Notice of Appeal.] Faith Center had refused to answer interrogatories and provide documents asserting that it was a religious organization protected by the First Amendment. In addition, it argued that, in the absence of a proper fraud charge, the document re-

quests violated the Fourth Amendment's protection against unreasonable searches and seizures. [Memorandum Brief, Attachment 5; Response to Motion For Protection of Documents, Attachment 6.] The ALJ found that a religious organization comes within the purview of the Commission when it secures a license and cannot avoid, by asserting First Amendment protections, the consequences of being a Commission licensee, which include the necessity of facing a hearing on a renewal application when public interest questions are raised. The ALJ was similarly not persuaded by the Fourth Amendment claim in light of the earlier ruling concerning the sufficiency of the fraud allegations.

The interlocutory rulings of the ALJ are not final orders appropriate for review by this Court under Section 402(b) The final order in this case, which can properly be appealed, is the order which will grant or deny Faith Center's renewal application. The hearing has not yet been held. If the hearing results in a denial of Faith Center's application, a proper appeal will permit it to raise the arguments it now seeks to raise or any other arguments. On the other hand, if the order issued should result in a grant of its application, that action would moot its concerns. Under these circumstances, the ALJ's rulings lack finality and the Court does not have jurisdiction to review them.[1]

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[1]The judge denied Faith Center permission for immediate appeal to the Commission pursuant to 47 C.F.R. §1.301(b) because he found that the orders did not raise new or novel questions. [*Order Following Third Prehearing Conference*, Appendix B of Notice of Appeal; Hearing Transcript, Vol. 3, p. 92, Attachment 7; April 20, 1979 Request for Permission To File Appeal, Attachment 8; *Memorandum Opinion and Order*, issued May 10, 1979, Appendix D to Supplementary Notice of Appeal.] Under Section 5(d)(7) of the Communications Act of 1934, 47 U.S.C. §155(d)(7), an application for review is a condition precedent to judicial review of orders made pursuant to delegated authority. Since Faith Center sought but was denied permission to appeal the rulings to the Commission, it appears that Faith Center's opportunity for later review rather than its failure to strictly comply with 47 U.S.C. §155(d)(7), should be the basis for dismissal of this case.

CONCLUSION

Accordingly, the Commission respectfully requests that this case be dismissed.

Respectfully submitted,

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632-7112.

June 22, 1979

APPENDIX H.

Order.

United States Court of Appeals, for the District of Columbia Circuit.

September Term, 1978.

Faith Center, Inc., Appellant, v. Federal Communications Commission, Appellee. No. 79-1478.

Filed: July 13, 1979.

BEFORE: *Wright, Chief Judge; Robb & Wilkey, Circuit Judges.

On consideration of appellee's motion to dismiss, of the response and opposition thereto, and of appellant's motion for stay, it is

ORDERED by the Court that appellant's motion for stay is denied in its entirety, and, it is

FURTHER ORDERED by the Court that appellee's motion is granted and this appeal is dismissed.

Per Curiam

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*Chief Judge Wright did not participate in the foregoing order.

APPENDIX I.

Memorandum Opinion and Order.

Before the Federal Communications Commission, Washington, D.C. 20554.

BC, FCC 81-235, 94673.

In re Application of Faith Center, Inc., Station KHOF-TV, San Bernardino, California, For Renewal of License. BC DOCKET NO. 78-326. File No. BRCT-746.

Adopted: May 7, 1981; Released: May 12, 1981.

By the Commission:

1. Before the Commission for consideration are petitions for reconsideration of a Commission order dismissing the application of Faith Center, Inc. (Faith) for renewal of its license to operate station KHOF-TV, San Bernardino, California, and rejecting a request for a distress sale of that station.[1] Both Faith and its President, Dr. W. Eugene Scott, filed Petitions for Reconsideration on December 3, 1980, the Broadcast Bureau filed an Opposition on January 16, 1981,[2] and Faith filed a reply on February 17.

2. Faith's renewal application for KHOF-TV was designated for hearing in response to allegations that Faith had engaged in fraudulent over-the-air fundraising in violation of the federal wire fraud statute and had failed to cooperate with a Commission investigation of these allegations.[3] Dur-

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[1] *Faith Center, Inc.*, 82 FCC 2d 1 (1980).

[2] Dr. Scott's petition was not filed in accordance with the Commission's rules. Moreover, the petition deals with the Broadcast Bureau's submission of certain affidavits containing substantive allegations about the designated issues. Consideration of these affidavits has been mooted by our disposition of Faith's renewal application on grounds of failure to prosecute. *See Faith Center, Inc., supra*, 82 FCC 2d at 37-39. Dr. Scott's petition will, therefore, be dismissed.

[3] Order and Notice of Apparent Liability, FCC 78-674, released October 11, 1978.

ing the course of the proceeding, the Broadcast Bureau served three sets of discovery requests on Faith. The Commission concluded that Faith's repeated inadequate responses to the first two of these requests revealed a pattern of bad faith obstructive conduct on Faith's part tantamount to failure to prosecute. Denial of Faith's petition for a distress sale of KHOF-TV was a consequence of Faith's misconduct; the Commission did not want to insulate Faith from the consequences of failing to cooperate with the ALJ in the discovery phase of the hearing by permitting a distress sale.

3. Faith's Petition for Rehearing consists mainly of a repetition of arguments made to the Commission in appealing the ALJ's ruling which the Commission affirmed in dismissing Faith's renewal application. Faith again faults the Commission for designating issues inquiring into Faith's alleged failure to cooperate with Commission investigators. Faith also argues that in resisting discovery it made a legitimate and good faith effort to vindicate its constitutional rights. Thus, Faith reiterates its argument that it submitted substantial amounts of information to the Commission, attempted to respond to discovery in good faith, and was not responsible for unwarranted delays in the proceedings. Additionally, Faith renews its contention that a distress sale of KHOF-TV would be appropriate. We need not readdress these arguments. Reconsideration will not be granted by the Commission merely for the purpose of rearguing matters which have previously been considered and resolved.[4] Since Faith has not disclosed any manifest errors or material

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[4] *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Company v. FCC*, 122 U.S.App.D.C. 127, 351 F.2d 824 (1965), *cert. denied*, 383 U.S. 967 (1966).

omissions warranting alteration of the original decision, its petition will be denied.

4 ACCORDINGLY, IT IS ORDERED, That the Petition for Rehearing, filed December 3, 1980, by Faith Center, Inc. IS DENIED.

6. IT IS FURTHER ORDERED, That the Petition for Reconsideration, submitted December 3, 1980, by Dr. W. Eugene Scott IS DISMISSED WITH PREJUDICE.

FEDERAL COMMUNICATIONS
COMMISSION

/s/ William J. Tricarico
William J. Tricarico
Secretary

APPENDIX J.

Memorandum Opinion and Order.

Before the Federal Communications Commission, Washington, D.C. 20554.

FCC 81-236, 94675.

In re Application of, Faith Center, Inc., Station KHOF-TV, San Bernardino, California, For Renewal of License. BC DOCKET NO. 78-326. File No. BRCT-746.

Adopted: May 7, 1981; Released: May 12, 1981.

By the Commission:

1. Faith Center, Inc. (Faith) and the East Los Angeles Community Union (TELACU) petition for reconsideration of the Commission's denial of their proposal for the distress sale to TELACU of two stations licensed to Faith, WHCT-TV, Hartford, Connecticut, and KVOF-TV, San Francisco, California.[1] The 1977 renewal applications for the two stations were placed in deferred status because a third Faith station, KHOF-TV, San Bernardino, California, had been designated for hearing on questions of fraudulent over-the-air fundraising and failure to cooperate with a Commission investigation. The distress sale proposal — covering all three stations — was intended to resolve the hearing proceeding.[2]

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[1] *Faith Center, Inc.*, 48 RR 2d 741 (1980). Faith and TELACU filed petitions on December 8, 1980, which the Broadcast Bureau opposed on January 23, 1981.

[2] The Commission's distress sale policy permits a licensee designated for renewal or revocation proceedings to assign its station to a minority purchaser at a price which may not exceed 75% of the fair market value of the station. *Lee Broadcasting Corp.*, 76 FCC 2d 462 (1980); *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 FCC 2d 979 (1978); *Clarification of Distress Sale Policy*, 44 RR 2d 479 (1978).

2. Shortly after Faith petitioned for distress sale relief the presiding judge dismissed Faith's application for renewal of KHOF-TV.[3] He held that Faith's repeated inadequate responses to Broadcast Bureau discovery requests constituted a pattern of bad faith and obstructive behavior tantamount to a failure to prosecute.

3. The Commission elected to consider Faith's appeal of the dismissal and the distress sale proposal at the same time in order to be able to assess the impact of affirming the dismissal on the distress sale. To complicate matters, the supplemental renewal applications for the two stations in deferred status were due in the near future.[4] The filing of a supplemental renewal would have opened a three month "window" for competing mutually exclusive applications; any filings of mutually exclusive applications would preclude a distress sale.

4. The due date for KVOF-TV's supplemental renewal was August 1, 1980, shortly after the end of the pleading cycle for Faith's appeal. Thus, the Commission did not have time to consider the implications of affirming the ALJ's dismissal of Faith's renewal application for KHOF-TV before the supplemental renewal for KVOF-TV was due. Therefore, the Commission granted a request by TELACU to defer the filing of the supplemental renewal for KVOF-TV until the Commission had the opportunity to decide whether the supplemental renewals should be deferred in-

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[3]80M-459, released March 17, 1981.

[4]Under usual Commission practice, the licensee of a station in deferred status is required to file a supplemental renewal application on the date a regular renewal application would otherwise be due. *See Carlisle Broadcasting Associates*, 59 FCC 2d 885 (1976); Sections 73.1020, 73.3516, and 73.3539 of the Rules. The filing of a supplemental renewal application opens a three month "window" during which petitions to deny and competing applications may be filed.

definitely to permit a distress sale.[5] The filing date was deferred to October 15, 1980. The Commission ordered interested parties to file briefs and reply briefs.

5. Faith and TELACU argued in their briefs that the supplemental renewals for KVOF-TV and WHCT-TV should be deferred indefinitely or the stations should immediately be placed in hearing status to permit a distress sale. They argued in essence that a station in deferred status should be no less transferable than a station in hearing status, especially where the benefits of a distress sale could be realized. They also argued that requiring the filing of supplemental renewals was a discretionary Commission policy that could be waived in appropriate circumstances.

6. The Broadcast Bureau and Together Media Ministries, a prospective competing applicant of KVOF-TV, argued against deferral or designation for hearing. In their view, deferral would violate the *Ashbacker*[6] rights of potential competing applicants, would deprive the affected communities of a comparative choice, and would vest a prohibited property interest in Faith.

7. On October 9, 1980, the Commission considered both Faith's appeal of the KHOF-TV dismissal and the distress sale proposal. The Commission affirmed the dismissal of KHOF-TV and, so as not to insulate Faith from the consequences of its misconduct denied the distress sale proposal as to that station.[7] The Commission also denied the distress sale proposal with regard to the two stations in deferred status. As a procedural matter, the Commission

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[5]FCC 80-460, released August 12, 1980.

[6]*Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945) stands for the proposition that mutually exclusive applicants are entitled to comparative hearing.

[7]*Faith Center, Inc.*, 82 FCC 2d 1 (1980), *recon. denied*, FCC 81-235, adopted May 7, 1981.

did not consider it appropriate to entertain a distress sale proposal of a station not designated for hearing. The Commission noted that Faith's proposed distress sale contemplated an extension of the Commission's distress sale policy which is relief available only to stations in hearing status. We noted that a distress sale was specifically intended to obviate the need for hearing. However, the Commission observed that this did not prejudice Faith, because the two stations could be designated for hearing and a distress sale could be effectuated. The Commission elected to designate WHCT-TV for hearing immediately, but elected not to defer the supplemental renewal date for KVOF-TV. Consequently, on October 15, 1980, Faith filed a supplemental renewal application for KVOF-TV. Subsequently, Faith's Motion for a Stay having been denied,[8] three competing applicants filed against KVOF-TV.

8. Faith and TELACU now complain that the Commission did not address the legal and policy considerations which the parties submitted in their briefs, and that the Commission has not justified treating WHCT-TV and KVOF-TV differently. Faith also argues that the result in this case cannot be reconciled with that in *RKO General, Inc.*[9] in which RKO's 13 radio stations were indefinitely insulated against comparative challenge by being designated for hearing.

9. We will deny the Petition for Reconsideration. Our rules and policies contemplated that normally, at least once every three years, the public will have an opportunity to file

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[8]Faith Center, Inc., 84 FCC 2d 542 (1981).

[9]48 RR 2d 945 (1980). The license renewals for RKO's radio stations had previously been conditioned on the outcome of the *RKO* proceeding in Boston, in which the Commission subsequently denied RKO's license to operate WNAC-TV because of corporate misconduct. *RKO General, Inc.*, 78 FCC 2d 1 (1980).

competing applications for a particular station.[10] If a renewal application or, as in this case, a supplemental renewal application is filed, the Commission may grant distress sale relief only *if no competing applications are filed*. Distress sale relief is not available to stations involved in comparative hearings.[11]

10. In the case of KVOF-TV, Faith Center essentially asked the Commission to deviate from this usual practice and to preclude the filing of competing applications, so that distress sale relief could be provided.[12] To grant this request the Commission would have had to waive applicable rules and policies. To justify such a waiver, Faith bore a heavy burden.[13] Faith failed to satisfy that burden. The only public interest benefit advanced by Faith was that a minority-controlled corporate owner would operate the station. While the Commission is strongly in favor of increasing minority ownership, that interest, under the peculiar circumstances present in this case, did not warrant a waiver of our rules. We anticipated that minority entrepreneurs, as well as other qualified applicants, would file competing applications. This would provide use with an opportunity to select the

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[10]*Supra* note 4. However, there are well established limitations to this policy. For instance, where a renewal application has been designated, and, as a result is already in heavy status, competing applications cannot be filed until the proceeding has been terminated. *Chronicle Broadcasting Co.*, 44 FCC 2d 717, 721 (1974), *affirmed sub nom. Committee for Open Media v. FCC*, 543 F.2d 861 (D.C. Cir. 1976).

[11]*Clarification of Distress Sale Policy, supra*, 44 RR 2d at 480 n. 3.

[12]We recognize that KVOF-TV's request for distress sale relief preceded the supplemental renewal application due date. However, by the time the Commission was prepared to act, the due date was imminent. A party has no vested right to a result it might have obtained, based on a situation that might have existed, if the Commission had expedited its request and acted earlier. *See Chromcraft Corp v. EEOC*, 465 F.2d 1159, 1163 (D.C. Cir. 1969).

[13]*WAIT Radio, Inc. v. FCC*, 418 F.2d 1159, 1163 (D.C. Cir. 1969).

applicant which would best serve the interests of the citizens of San Francisco.[14]

11. In the WHCT-TV proceeding, in contrast, we were inclined to designate that station for hearing and allow it to come within the reach of the distress sale policy because the licensee was not yet due to file its supplemental renewal application. Hence, we could provide the requested relief without waiving any rule or any of our policies. The instant petitions offer no new grounds which would convince us to reconsider our original decisions in distinguishing between KVOF-TV and WHCT-TV.

12. We believe the equities in the present case are considerably different from those in *RKO, supra,* in which potential competitors were cut off despite the general public interest in a comparative choice. We have previously discussed these equities.[15] They are: (1) *RKO* involved extraordinary procedural difficulties because 13 different licenses were involved, the renewal of which came due at different times over a period of two years; (2) potential competitors in *RKO* had previous opportunities to file against RKO after facts impugning RKO's qualifications were publicly available; and (3) RKO's previous renewals had all been granted subject to the condition that we would reconsider the renewals after a final decision in the WNAC-TV proceeding. Equities such as these do not exist in the present case.

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[14]In fact, as a result of our denial of Faith's request, three applicants with significant minority representation have filed competing applications for the ....

[15]84 FCC 2d at 544-45.

13. ACCORDINGLY, IT IS ORDERED, That the petitions for reconsideration, filed December 8, 1980, by Faith Center, Inc., and the East Los Angeles Community Union ARE DENIED.

FEDERAL COMMUNICATIONS
COMMISSION
William J. Tricarico
Secretary

APPENDIX K.

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

October 27, 1982

Kenneth E. Roberson, Esq.
1615 South Glendale Avenue
Glendale, California 91205

Re: Los Angeles, California
BC Docket Number 82-212

Dear Roberson:

The Review Board has under consideration your motion filed October 25, 1982 for permission to file an appeal from the Administrative Law Judge's Memorandum Opinion and Order, FCC 82M-2746, released September 13, 1982, dismissing Faith Center, Inc.'s application, in excess of the prescribed length. Specifically, you assert that an appeal of up to fifty pages is required in order to adequately brief approximately twenty enumerated questions which you wish to raise. Without deciding the matter at this time, it appears to the Board that a number of these questions have been resolved previously in the proceeding in which the D.C. Circuit Court of Appeals affirmed the Commission's dismissal of Faith Center, Inc.'s KHOF-TV renewal application. *See Faith Center, Inc.*, 82 FCC 2d 1 (1980), *recon denied*, FCC 81-235 (1981). In addition, other matters you list do not appear to be within the scope of the issues discussed and decided in the order that is being appealed. In view of the foregoing, we believe an appeal of fifteen pages, which is triple the normal page limit, would be more than

adequate to address the pertinent issues raised by the Administrative Law Judge's ruling. Your appeal is to be limited accordingly.

Sincerely yours,
/s/ Joseph A. Marino
Joseph A. Marino
Chairman, Review Board

cc: Eugene F. Mullin, Esq.
Miller & Fields
Roy R. Russo, Esq.

APPENDIX L.

Faith Center and/or Wescott Christian Center

1919 SOUTH GLENDALE AVENUE · GLENDALE, CALIFORNIA 91205

☐ Dr. Gene Scott Ministries 20th. Century Philippian Christian Fund

This Faith Promise is an expression of religious worship to God and as such is a clear expression of the donors freedom of religion expression protected by the First Amendment of the United States Constitution.
Any monies paid on this Faith promise does not create a charitable Trust but is contribution to my Lord Christ through His agency the church and the church denies expressly agrees never to reveal information regarding my donations to any government agency.
Dr. Gene Scott as the Pastor of Faith Center and Wescott Christian Center Churches is expressly authorized to determine designation of these funds, including freedom to change designations or apply all or any part of donation to the general budget and or expense of either Faith Center or Wescott Christian Center Churches. These are unrestricted gifts to God through His Churches, pastored by Dr. Gene Scott and any supervision, required disclosure, or interference by government agencies, will violate my civil rights and U.S.C.A. Title 42, article 1983

EHOP NO. _____ MY FAITH PROMISE $ _____

PHONE: _____ ONE TIME $ _____ MONTHLY $ _____

☐ MR.
☐ MRS.
☐ MISS
☐ REV.
☐ and FAMILY

_____
(First) (Middle) (Last)

_____
Street Address or Box Number

_____
City State Zip Code

COUNSELOR _____ PAYMENT RECEIVED _____ PERM. RECEIPT MADE _____
Date Date